



Strathmore
UNIVERSITY

**SECURE TENURE BEHIND SLUM UPGRADING AND INFORMAL
SETTLEMENTS**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws
Degree, Strathmore University Law School

By

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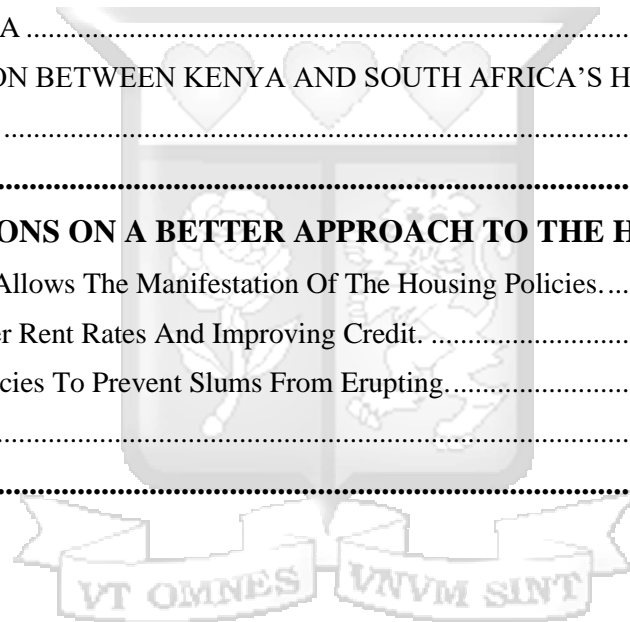
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Declaration

I, NICOLE NDANU NZAU, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

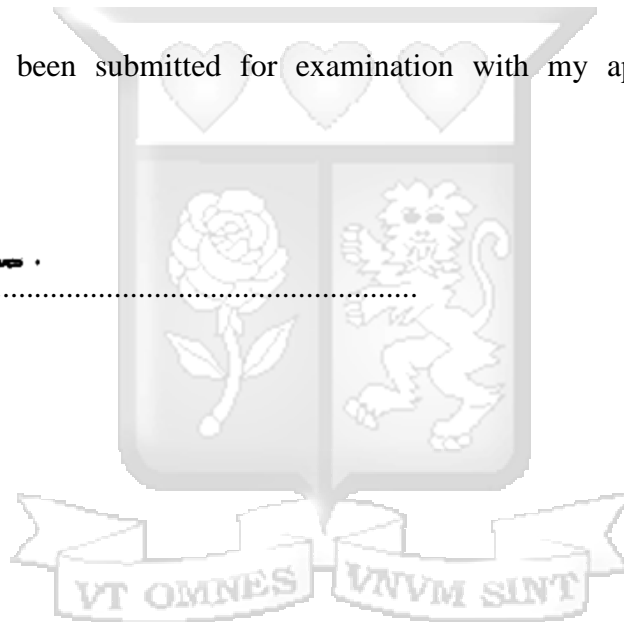
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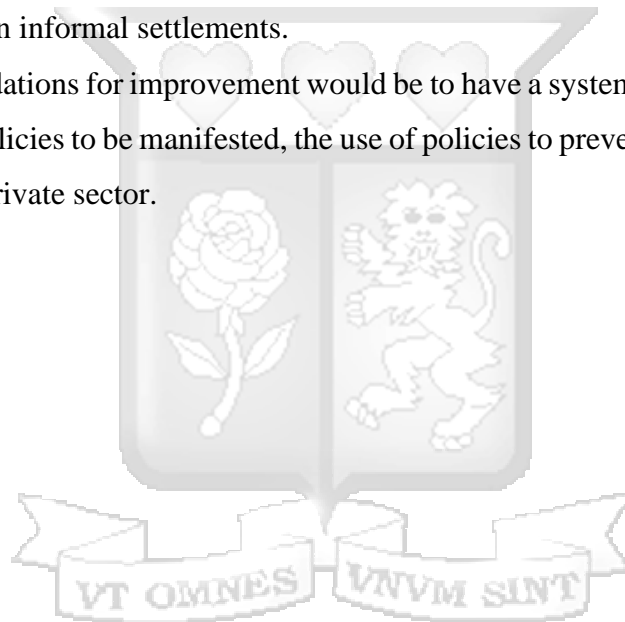
Abstract

The objective of this dissertation is to determine whether strengthening the property rights of the urban and rural poor would be a temporary and/or permanent solution to informal settlements in Kenya.

The methodology used is a historical analysis to examine the eruption of the housing crisis and its progression towards the years. Also, it will look at the developments towards dealing with homelessness and, the measures and progression taken by the law. Additionally, this study takes a look at the lessons learnt from South Africa.

The major findings are that there are different forms of housing that should be taken into consideration when offering alternative housing as well as different approaches that South Africa has used to offering social housing to low-income earners and catering to the needs of the residences living in informal settlements.

The major recommendations for improvement would be to have a system in place so as to allow these measures and policies to be manifested, the use of policies to prevent slums from erupting and inclusion of the private sector.



List of Abbreviations

1. BETA - Bottom-up Economic Transformation Agenda
2. KENSUP – Kenya Slum Upgrading Project
3. NHC – National Housing Corporation
4. NLC – National Lands Commissions
5. NYS – National Youth Service
6. PHP - People’s Housing Process
7. SAPS – Structural adjustment programmes
8. UN-HABITAT - United Nations Human Settlements Programme
9. UNTA - United Nations Technical Assistance



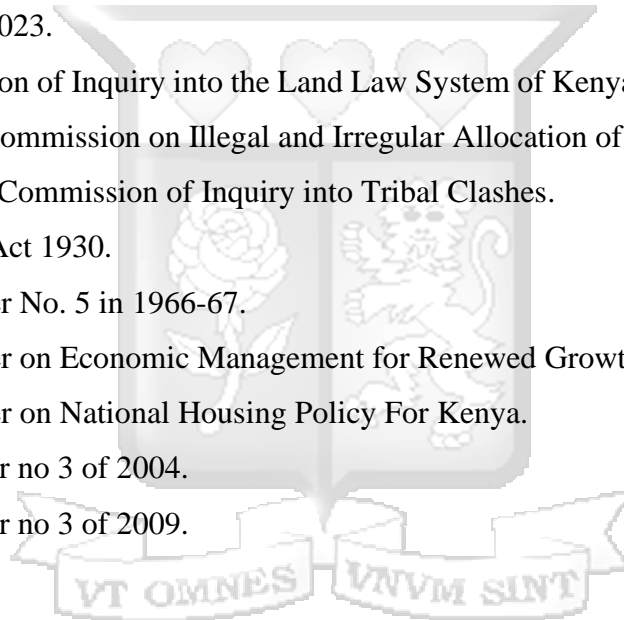
List of Cases

1. Gidion Mbuvi Kioko v Attorney General & another [2017] eKLR.
2. Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others [2013] eKLR (unreported).
3. John Peter Mureithi & 2 Others V Attorney General & 4 Others [2006] eKLR.
4. Government of the Republic of South Africa and Others v Grootboom and Others (2000).
5. Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others (2008).
6. Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (2009).



List of Legal Instruments

1. Constitution of Kenya, 2010.
2. The Employment of Servants Ordinance, 1906.
3. International Covenant on Economic, Social and Cultural Rights.
4. Constitution of South Africa, 1996.
5. Land Act, No. 6 of 2012, Kenya.
6. Housing Act, CAP 117, 2012.
7. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 (PIE Act).
8. The Extension of Security of Tenure Act 62 of 1997 (ESTA).
9. Finance Act, 2018.
10. Finance Act, 2023.
11. The Commission of Inquiry into the Land Law System of Kenya. Njonjo Commission.
12. The Ndungu Commission on Illegal and Irregular Allocation of Public Land.
13. The Akiwumi Commission of Inquiry into Tribal Clashes.
14. Public health Act 1930.
15. Sessional Paper No. 5 in 1966-67.
16. Sessional Paper on Economic Management for Renewed Growth
17. Sessional Paper on National Housing Policy For Kenya.
18. Sessional paper no 3 of 2004.
19. Sessional paper no 3 of 2009.



CHAPTER 1

SECURE TENURE BEHIND SLUM UPGRADING AND INFORMAL SETTLEMENTS

1.1 - BACKGROUND

By definition, informal settlements are residential areas where the inhabitants have no security, they lack basic services and amenities and city infrastructure and they may not comply with the current planning and building regulations that have been set by the government.¹ According to the International Covenant on Economic, Social and Cultural Rights, the right to housing is recognised under article 11, as a component of the wider right to an adequate standard of living, it also includes the rights to adequate food, clothing and improvement of their living conditions.²

In Kenya, the proliferation of informal settlements is alarming and in Nairobi alone, there are about 200 settlements where slum dwellers reside with approximately 2.5 million slum dwellers.³ The four largest informal settlements include Kibera, Mathare, Korogocho and Mukuru Kwa Njenga.⁴ For many years, informal settlements have been a part of Kenya's urban developmental history.⁵ There is clear evidence to support this statement since pre-independence, Europeans reserved the best lands for themselves while Africans were given middle-quality and mostly low-quality land.⁶ However, even after independence, many urban areas were affected by the rural-to-urban migration whereby they became overpopulated, leading to many homeless people, hence the emergence of informal residences.⁷

¹ Habitat III Issue Papers, 22, May 2015 – Informal Settlements - <https://habitat3.org> - on 8 September 2023.

² Article 11, International Covenant on Economic, Social and Cultural Rights, 1976.

³ NCSS, Population and Health Dynamics in Nairobi's Informal Settlements: Report of the Nairobi Cross-sectional Slums Survey, 2012 - <https://www.kibera.org.uk/facts> - on 27 December 2022.

⁴ Weru J and Cobbett W, Slum Upgrading in Kenya: What Are the Conditions for Success?, Thomson Reuters Foundation, 2021- <https://www.citiesalliance.org/newsroom/news/cities-alliance-news/slum-upgrading-kenya-what-are-conditions-success> - on 23 February 2023.

⁵ Abaki Z, Factors Influencing the Implementation of the Slum Upgrading Project in Kibera Slums, Unpublished L.L.M Thesis, University of Nairobi, Nairobi County, Kenya, 2018 - <http://erepository.uonbi.ac.ke/bitstream/handle/11295/104075/Abaki%20Zipporah.pdf?sequence=2> - on 27 December 2022; Ministry of Land, Housing and Urban Development, National Slum Upgrading and Prevention Policy, 2016, 5 and 6.

⁶ Ministry of Land, Housing and Urban Development, National Housing Policy For Kenya, Sessional Paper No.3, 2016, 3 - <https://www.housingandurban.go.ke/wp-content/uploads/2019/10/Updated-Sessional-Paper-No.3-of-2016-National-Housing-Policy.pdf> - on 27 December 2022.

⁷ Abaki Z, Factors Influencing the Implementation of the Slum Upgrading Project in Kibera Slums, 4.

Having seen this problem, the government embarked on a slum upgrading initiative to curb the issue of informal settlements, by offering solutions that the persons living in those areas could be facing.⁸ This initiative had helped many Kenyans in their various projects such as the Nyayo Highrise estate and Canaan estate.⁹ The slum upgrading initiative has attempted to uphold secure tenure for residents living in Kibera Soweto B.¹⁰ It has, with some success, given secure tenure to the people living there but has had its stumbling blocks to it.¹¹ For example, some problems include tenure arrangements, competing interests of various groups such as NGOs, and conflicts between tenants and landlords,¹² but also that these projects were occupied by the middle class, rather than those with lower incomes.¹³

Conventionally, secure tenure grants the owner of the land exclusive rights to which they are entitled to enjoy the parcel of land that they own. However, it is important to note that, slum dwellings lack the capacity to enforce these rights. Moreover, slum dwellers must pay rent for the 'house' that they live in but do not own,¹⁴ which mostly entails corrugated iron sheets of a smaller-sized version of a studio room, with an approximate area of 0.016km².¹⁵ Despite paying rent, slum dwellers struggle paying for additional services such as the use of washrooms, bathrooms and water services that should be readily available to the people.¹⁶

It then begs the question as to how and why they are paying rent to the settlement that is unclaimed and without property rights. This anomaly creates a frustrating environment for the courts to mitigate and for the residents themselves since they have a lot more to lose than to gain. It also increases the number of homeless people and increases the crime rate and insecurity as there would be more people living on the streets if their homes were excavated without giving them an alternative.

⁸ Ministry of Land, Housing and Urban Development, National Slum Upgrading and Prevention Policy, 2016, 1.

⁹ Open Letter to President Ruto on Slum Upgrading - <https://www.citizen.digital/opinion-blogs/opinion-open-letter-to-president-ruto-on-slum-upgrading-n308059> - on 29 December 2022.

¹⁰ Muraguri L, Kenyan Government Initiatives in Slum Upgrading, 2011, 119 - 127 -

<https://journals.openedition.org/eastafrica/534?lang=en#tocto1n2>, - on 29 December 2022.

¹¹ Open Letter To President Ruto On Slum Upgrading - <https://www.citizen.digital/opinion-blogs/opinion-open-letter-to-president-ruto-on-slum-upgrading-n308059> - on 29 December 2022.

¹² Open Letter To President Ruto On Slum Upgrading - <https://www.citizen.digital/opinion-blogs/opinion-open-letter-to-president-ruto-on-slum-upgrading-n308059> - on 29 December 2022; Muraguri L, Kenyan Government Initiatives in Slum Upgrading, 119 – 127.

¹³ Muraguri L, Kenyan Government Initiatives in Slum Upgrading, 119 – 127.

¹⁴ Slum houses one of 'most lucrative' ventures in city, 2020 - <https://nation.africa/kenya/news/slum-houses-one-of-most-lucrative-ventures-in-city--573160> - on 9 January 2023.

¹⁵ Friesena J, Taubenböck H, Wurmb M, Pelz P.F, The similar size of slums, Habitat International, 73, 2018, 79 - <https://www.sciencedirect.com/science/article/> - on 2 November 2023.

¹⁶ Odenyo A, Rising Cost Of Living Hit Mothers In Mathare Hard, 2022 - <https://www.the-star.co.ke/news/big-read/2022-10-06-rising-cost-of-living-hits-mothers-in-mathare-hard/> - 1 November 2023.

Secure tenure grants the people an easier access point to several services rendered by the government. However, people living in informal settlements do not have this luxury, since they do not have a strong claim to property rights. This is confirmed in the case of *Gidion Mbuvi Kioko v Attorney General*.¹⁷ In this case, the petitioner on behalf of the slum dwellers of Sinai Village in Embakasi expressed that they had a constitutional right to housing and access to the area they were dwelling and that the respondents had infringed on their economic and social rights.¹⁸ Unfortunately, the residents of Sinai Village were asked to relocate without an alternative.¹⁹

Without secure tenure, informal settlers have a disadvantage when it comes to getting a remedy from the court since the courts cannot give a remedy where the property rights do not exist.²⁰ For this reason, the courts mostly do not have a conclusive remedy when it comes to evictions of slum dwellers.²¹ The courts should have allocated an alternative area, a contrast as to what was held in the case of *Gidion Mbuvi*, which was stated above, and *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others*.²² The court, in the subsequent case, states that the people who reside in the Kaptagat village and Masai village located in Kitisuru had placed their residence on a road, that was deemed public property, hence leading to their eviction.²³

Even though there are various instances in which the required procedure for eviction is followed, many other times it is not.²⁴ For example, when viewing what had happened with the Mau forest evictions, the government and other individual investors failed to give adequate notice for the eviction of the Meru people living in the area, leaving them without an alternative

¹⁷ *Gidion Mbuvi Kioko v Attorney General & another* [2017] eKLR.

¹⁸ Constitution of Kenya, Article 43, 2010.

¹⁹ *Gidion Mbuvi Kioko v Attorney General & another* [2017] eKLR, para 64 and 66.

²⁰ *Gidion Mbuvi Kioko v Attorney General & another* [2017] eKLR, para 48. The court cited *Anarita Karimi Njeru (1976-80) 1 KLR 1272* and *Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012*, where the court states as a basic minimum, the petitioners are required to not only cite the provisions of the constitution which have been violated, and the manner in which they have been violated with regard to them.

²¹ *Gidion Mbuvi Kioko v Attorney General & another* [2017] eKLR, *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others* [2013] eKLR (unreported).

²² *Gidion Mbuvi Kioko v Attorney General & another* [2017] eKLR, *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others* [2013] eKLR (unreported).

²³ *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others* [2013] eKLR (unreported).

²⁴ Kimatu S, *Mukuru Demolitions An Eye Opener On Slum Landgrabs*, Daily Nation, 2022-

<https://nation.africa/kenya/blogs-opinion/blogs/mukuru-demolitions-an-eye-opener-on-slum-landgrabs-3679308> on 9 January 2023 .

or relocating them.²⁵ The government reserves land to prepare for major projects and other public land uses.²⁶ However, the government failed to factor in how the current residents would be compensated, rendering many other people homeless.²⁷

Like Kenya, South Africa is faced with the same problem. In South Africa, the amount of available housing does not match the number of homeless persons, meaning there are more homeless than there is affordable housing.²⁸ Additionally, the housing issue is also attributed to the rise in the cost of living.²⁹ With less affordable houses left it creates a conundrum where more people opt for slum shelters and less standard living conditions.³⁰ The difference between South Africa and Kenya is shown by the different policies and the approach that the courts have taken. For example, to avoid arbitrary evictions, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 (PIE Act) was enacted.³¹

1.2 - STATEMENT OF PROBLEM

Shanty areas or slum settlements are a result of rapid urbanization and demographic growth, bad policies, and a lack of political good will.³² The remedies that are available are mostly, if not only, for the people who have ownership of land as compared to squatters and slum settlers', hence the homeless don't have an alternative.

The courts have an obligation to view the laws not only looking at what remedy the parties are looking for but what would be the best alternative for the people when such claims arise.

²⁵ Chepkwony J, Thousands Fight Eviction From Mau Forest, Standard Media October 2022- <https://www.standardmedia.co.ke/article/2001459584/thousands-fight-eviction-from-mau-forest> on 9 January 2023.

²⁶ Ministry of Lands, Public Works, Housing and Urban Development, State Department of Lands and Physical Planning, Programmes and Projects - <https://lands.go.ke/programmes-and-projects/> - on 3 November 2023.

²⁷ Kimatu S, Mukuru demolitions an eye opener on slum landgrabs 12 January 2022 - <https://nation.africa/kenya/blogs-opinion/blogs/mukuru-demolitions-an-eye-opener-on-slum-landgrabs-3679308> on 9 January 2023; Chepkwony J, Thousands fight eviction from Mau Forest, Standard Media 2022.- <https://www.standardmedia.co.ke/article/2001459584/thousands-fight-eviction-from-mau-forest> on 9 January 2023.

²⁸ Banda M, Mind the gap — solutions to Joburg's inner-city housing crisis hamstrung by budget constraints, Daily Maverick - <https://www.dailymaverick.co.za/joburg-inner-city-housing-heart-of-darkness/> - On 24 April 2024

²⁹ Centre of Affordable Housing Finance in Africa, Housing Finance in South Africa, 2023 - <https://housingfinanceafrica.org/countries/south-africa/> - on 24 April 2024

³⁰ Centre of Affordable Housing Finance in Africa, Housing Finance in South Africa, 2023 - <https://housingfinanceafrica.org/countries/south-africa/> - on 24 April 2024

³¹ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998.

³² M. Bah E, Faye I and F. Geh Z, Slum Upgrading and Housing Alternatives for the Poor, Housing Market Dynamics in Africa, Macmillan Publishers Ltd, 2018, 215–253 - https://link.springer.com/chapter/10.1057/978-1-137-59792-2_6 - 23 February 2023.

Kenyan living in shanty areas are always at risk of insecurity, violence, and inaccessibility to essential services, being evicted and living in unhealthy conditions in the cities and even rural areas. However, the courts tend to overlook this aspect since they mostly base their rationale for their decisions on a civil claim rather than a constitutional right as seen in the cases stated above, *Gideon Mbuvi and the Susan Wiathera Kariuki case*.

In addition, most of the slum upgrading projects that have been constructed are being utilised by the middle class, leaving the lower-income earners in the slum dwellings with poor sanitary services, poor access to water and poor housing conditions.³³ This study seeks to analyse how laws can be designed to strengthen the property rights of the urban and rural poor and whether this will be a temporary or permanent solution to informal settlers in Kenya.

1.3 - RESEARCH OBJECTIVES

1. To analyse the depth of the housing crisis and the manner it has evolved.
2. To analyse the history of the attempts to curb the eruption of slums, the steps taken towards improving housing and what the state's current approach is.
3. To examine how South Africa, has implemented policies that have managed to reduce the eruption of slums in their cities.
4. To propose an approach to the housing sector, that would be beneficial for the lower income earners and that will enhance the development of Kenya.

1.4 - RESEARCH QUESTION

1. What is the depth of the housing crisis and the manner it has evolved?
2. What was the historical approach towards improving housing and what is the state's current approach?
3. What measures, policies and laws have South Africa implemented to curtail the eruption of slums?
4. What approach would be beneficial for the lower income earners and that will enhance the development of Kenya?

³³ Open Letter to President Ruto on Slum Upgrading - <https://www.citizen.digital/opinion-blogs/opinion-open-letter-to-president-ruto-on-slum-upgrading-n308059> - on 29 December 2022; M. Bah E *et al*, Slum Upgrading and Housing Alternatives for the Poor, 215–253.

1.5 - HYPOTHESIS

Having secure tenure over the alienated land would ensure that the percentage of the population in slums having secure rights, and this would create a larger labour pool, that can turn dead capital of the slum areas into working capital. Therefore, having well-designed laws that have a pro-poor focused angle could be a means of giving them access to secure tenure and land that is for their benefit. Furthermore, having the appropriate tools and strategies to increase poor people's access to secure land and housing, would also be a necessity in reclaiming land for agricultural purposes, to ensure food security and productivity within the country.

1.6 - JUSTIFICATION

Housing is not only a commodity but a right.³⁴ Failure of acquiring secure tenure can leave one vulnerable to violence, especially women and children who are vulnerable to being beaten, sexually assaulted, tortured, or killed.³⁵

For development to be effective in Kenya, dealing with the issue of homelessness is an essential step. Enforcing property rights is important in the sense that it is one of the fundamental institutions that a working society should have.³⁶ Instead of investing in these lands, they are left alienated and underdeveloped.³⁷ The central concern for parliamentarians when drafting land policies is the bureaucratic power and its control.³⁸ They fail to grasp the weight of the impact of how these laws are to be applied and implemented, as they are mostly focused on the capital markets.³⁹

³⁴ Matanga B.O, Implementing The Right To Housing For Residents Of Slums And Informal Settlements In Kenya: Legal, Policy And Institutional Challenges And Prospects, School Of Law, University Of Nairobi, Nairobi, 2015, 8 - <http://erepository.uonbi.ac.ke/> - on 28 February 2023.

³⁵ Ocheje P, "In the Public Interest": Forced Evictions, Land Rights and Human Development in Africa, Journal of African Law, Vol. 51, No. 2, 2007, 197 - https://www.jstor.org/stable/27607987?read-now=1&seq=28#page_scan_tab_contents in 10 January 2023.

³⁶ Wolla S.A, Why Are Some Countries Rich and Other Poor?, 2017; Olson, Mancur. "Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Other Poor." Journal of Economic Perspectives, 1996, 10(2), 3-24.

³⁷ Weru J and Cobbett W, Slum Upgrading in Kenya: What Are the Conditions for Success?, Thomson Reuters Foundation, 2021- <https://www.citiesalliance.org/newsroom/news/cities-alliance-news/slum-upgrading-kenya-what-are-conditions-success>

³⁸ Manji A, Whose Land Is It Anyway? The failure of land law reform in Kenya, African Research Institute, 2015 - <https://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/> - on 7 March 2023.

³⁹ Manji A, Whose Land Is It Anyway? The Failure Of Land Law Reform In Kenya, African Research Institute, 2015 - <https://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/> - on 7 March 2023.

This study will thus be useful to the Kenya National Slum Upgrading Programme (KENSUP) as well as the National Housing Corporation (NHC), in the sense that it will provide a pathway as to how national housing can incorporate not only the middle class but also the lower income earners. This study will also be useful to policymakers such as members of parliament when formulating laws geared towards land policy and having more debates involving issues on innovative forms of tenure, which address the constraints on livelihoods and natural resources. This study will also assist researchers who are working on finding different modes of innovation in which tenure can be formalised to solve the issue of homelessness and in essence poverty.

1.7 - THEORETICAL FRAMEWORK: THE INTEGRATION OF THEORIES

The most prominent and most applied theory is by De, Soto, which emphasizes the use of land, by converting it from dead capital to working capital.⁴⁰ According to De Soto, having secure tenure entails having secure property rights which are manifested into a written, formal, and legal property system.⁴¹ Therefore, through having secure tenure, dead capital can be mobilised in a manner that can be reused into working capital and can be a means to acquire formal credit and economic growth.⁴² De Soto reiterates that property relations in any society are dynamic and changeable, therefore, they allow several types of property holding arrangements to co-exist.⁴³ Having multiple forms of tenure for different land uses calls for different forms of systems which can be useful to the rural poor.⁴⁴

However, this theory alone cannot be used since its application has been proven to be ineffective in other countries such as South Africa, where critics have cited that the land titling mechanisms that De Soto proposes only benefit the middle class and the elites,⁴⁵ as compared

⁴⁰ Musembi C, Breathing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa, 2006, 13

⁴¹ Williamson C.R, The Two Sides of de Soto: Property Rights, Land Titling, and Development, The Annual Proceedings Of The Wealth And Well-Being Of Nations, Beloit College, 2010, 96 - https://sbselearning.strathmore.edu/pluginfile.php/9769/mod_resource/content/1/SSRN-The%20two%20sides%20of%20De%20Soto.pdf – on 24 April 2024.

⁴² Musembi, Breathing Life into Dead Theories about Property Rights, 15; Kiddle G, Perceived security of tenure and housing consolidation in informal settlements: case studies from urban Fiji, Vol 25, No.3, 2010, 196.

⁴³ Musembi C, Breathing Life into Dead Theories about Property Rights, 13.

⁴⁴ Musembi C, Breathing Life into Dead Theories about Property Rights, 13.

⁴⁵ Kingwill R, Cousins B, Cousins T, Hornby D, Royston L and Smit W, Mysteries and Myths: De Soto, Property and Poverty in South Africa, 2006, 7.

to lower income earners are not able to keep up with that expenditure during their day-to-day lives.⁴⁶

Hence this study proposes that not only should the application of De Soto's theory be applied but two others: first, the evolutionary theory of land rights and second, the democratic adaptation theory. The evolutionary theory speaks on the joint impact of increasing population pressure and market integration.⁴⁷ This theory is manifested where land rights will evolve towards rising individualization and hence the evolution eventually leads rights-holders to press for the creation of duly formalized property rights.⁴⁸

To explain further, the evolutionary theory looks at the emergence of new property rights taking place in response to the desires of interacting persons for adjustment to new cost-benefit possibilities.⁴⁹ Basically, so long as land is abundant and can be used communally, the absence of exclusivity and free transferability does not have detrimental consequences.⁵⁰ Hence, the gains from the internalised effects of enforcing the property rights would be smaller compared to the costs of establishing and enforcing property rights.⁵¹

However, with the growing population, there is an increased competition on the use of land. Therefore, the ability to hinder others from accessing the land becomes realised, leading to an instability in property rights.⁵² The effect of the internalised effects becomes too heavy, it leads to privatisation of land.⁵³ In effect, where the gains of internalisation become greater than the cost of enforcing property rights, for their to be economic efficiency, communal rights are replaced with private ownership rights.⁵⁴

⁴⁶ Kingwill R, *Mysteries and Myths*, 7.

⁴⁷ Hull S, Babalola K.H and Whittal J.F, *Theories of Land Reform and Their Impact on Land Reform Success in Southern Africa*, 2019, 10 - <https://www.researchgate.net/publication> - 5 March 2023

⁴⁸ Hull S, *Theories of Land Reform and Their Impact on Land Reform Success in Southern Africa*, 10.

⁴⁹ Platteau J.P, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment Development and Change*, 1996, 31 and 32; Demsetz, H. 'Towards a Theory of Property Rights', *American Economic Review, Papers and Proceedings*, 1967-
[https://www.academia.edu/60657626/The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa A Critical Assessment](https://www.academia.edu/60657626/The_Evolutionary_Theory_of_Land_Rights_as_Applied_to_Sub-Saharan_Africa_A_Critical_Assessment) - on 5 March 2023

⁵⁰ Platteau J.P, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment Development and Change*, 31 and 32.

⁵¹ Platteau J.P, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment Development and Change*, 31 and 32.

⁵² Platteau J.P, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment Development and Change*, 31 and 32.

⁵³ Platteau J.P, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment Development and Change*, 31 and 32.

⁵⁴ Platteau J.P, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment Development and Change*, 31 and 32.3

Cost-benefit possibilities arise where there are significant changes in technology, as an example, that are reflected in price variations. In effect, it could cause a disequilibrium between the marginal returns and the marginal costs of factor input. Therefore, where the marginal costs are lower than the returns, it is said to be a cost benefit.⁵⁵

The democratic adaptation theory emphasises the need for democratization, justice (particularly around gender equality), and accountability.⁵⁶ This theory focuses on anti-eviction measures, democratic land administration and governance, gender equity in land allocation, and locally accepted evidence. Therefore, land rights-holders may be protected from human rights abuses at the hands of traditional leaders acting under the authority of the State.⁵⁷ This theory is manifested through the respect of existing land rights that are recognised by African customary law such as community rights to land and providing land tenure security where customary tenure systems are weak.

Thus, these theories will assist this study in directing Kenya's approach to law-making in that it will firstly show that the need for land law reform will not only have an impact on the current population, but the formulation of the laws would need to consider the growing population and the rate of urbanisation, hence would need to be futuristic. In effect, this will not only cover civil claims but also claims based on housing as a human right.

1.8 - LITERATURE REVIEW

1.8.1 - The stagnation of the land law reforms.

The conversation behind the reconstruction of the land reforms revolves around the reformulation of the land law reforms, for the benefit of each member of the society.⁵⁸ In contrast, the land laws in place focus on the marketability of the land and its ability to create capital rather than address the issues of land reform as an urgent problem that needs to be

⁵⁵ Platteau J.P, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment Development and Change*, 31 and 32.

⁵⁶ Hull S, *Theories of Land Reform and Their Impact on Land Reform Success in Southern Africa*, 10.

⁵⁷ Hull S, *Theories of Land Reform and Their Impact on Land Reform Success in Southern Africa*, 8.

⁵⁸ Manji A, *Whose Land Is It Anyway? The Failure Of Land Law Reform In Kenya*, African Research Institute, 2015 - <https://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/> - on 7 March 2023.

deliberated.⁵⁹ Hence, not many are keen to restructure these laws for the benefit of the poor since it would affect the market structures and systems that are built around those laws.⁶⁰

For example, Article 40 (1) of the Constitution of Kenya sets out the principles governing land policy and provides that “Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable”.⁶¹ This provision protects private property rights and does not extend to property that is squatted. Article 61 (1) of the Constitution of Kenya states that “All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals”.⁶² However, private individuals and the market economy take priority rather than the rights and needs of disadvantaged individuals.⁶³

Additionally, Article 63 of the Constitution of Kenya, provides for what entails Community land as land lawfully registered in the name of group representatives, land lawfully transferred to a specific community and any land declared to be community land by an Act of Parliament.⁶⁴ There is further evidence that shows that slum settlements constitute a community since their residences are in form of urban villages or non-traditional communities.⁶⁵

The legalistic approach of land reform in Kenya has led to foreclosed debates about redistribution, prioritising land law reform as the most effective way to address land problems and evading more difficult questions about who controls access to land and how a more just distribution might be achieved.⁶⁶ It goes without saying that through redistribution of land, the land tilting programmes set in place have been used by bigger game players (those with the capability to purchase the land) rather than those in need of it.⁶⁷

⁵⁹ Manji, Whose Land Is It Anyway? The Failure of Land Law Reform in Kenya. African Research Institute, 2015 - <https://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/> - on 7 March 2023.

⁶⁰ Manji A, Whose Land Is It Anyway? The Failure Of Land Law Reform In Kenya, African Research Institute, 2015 - <https://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/> - on 7 March 2023.

⁶¹ Article 40 (1), Constitution of Kenya, 2010.

⁶² Article 61 (1), Constitution of Kenya, 2010.

⁶³ Manji A, Whose Land Is It Anyway? The Failure Of Land Law Reform In Kenya, African Research Institute, 2015 - <https://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/> - on 7 March 2023.

⁶⁴ Article 63, Constitution of Kenya, 2010.

⁶⁵ Wily L.A, The Community Land Act in Kenya Opportunities and Challenges for Communities, Van Vollenhoven Institute, 2018, 9 - <https://mdpi.com/2073-445X/7/1/12> - on 3 November 2023.

⁶⁶ Manji A, Whose Land Is It Anyway? The Failure Of Land Law Reform In Kenya, African Research Institute, 2015 - <https://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/> - on 7 March 2023.

⁶⁷ Manji A, Whose Land Is It Anyway? The Failure Of Land Law Reform In Kenya, African Research Institute, 2015 - <https://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/> - on 7 March 2023.

The formalisation and monetisation of land tenure have gone hand-in-hand as part of a “market-friendly” approach, Patrick McAuslan states, that in order to move from policy formulation to drafting laws is not, to move from a debate on policy to one on legal technicalities, the technical is highly political.⁶⁸ An interesting question concerns the degree to which the lack of formal property rights limits economic growth.⁶⁹

Having an overly legal view is not new but having a different approach to it could be. To elaborate, human beings have always wanted to be self-governed.⁷⁰ However, this has proven to be ineffective since conflict arises while leading to negative externalities.⁷¹ These negative externalities include conflicts, harm to individuals and/or forced to act out of self-defence.⁷² Therefore the law as an instrument to ensure that peace is maintained is essential in so far as the regulation of land that it uses.⁷³ Hence, state interference is of utmost importance because without being equipped with the appropriate laws, conflicts over property would never subside and parties may never come to a compromise.⁷⁴

The overriding influence of the privatisation of property has led the policy objectivity being skewed, hence having more politicised policies and laws than strictly legal ones.⁷⁵ This can be seen where apartments that do not follow the zoning guidelines are being constructed.⁷⁶ As stated by Craig Anthony (Tony) Arnold, private property norms serve as political, cultural, and

⁶⁸ Manji A, *Whose Land Is It Anyway? The Failure Of Land Law Reform In Kenya*, African Research Institute, 2015 - <https://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/> - on 7 March 2023.

⁶⁹ Glomsrad S, *Property Rights - A Temporary Relief for the Poor?*, 2002, 373 - <https://www.tandfonline-com>. - on 7 March 2023.

⁷⁰ Donald J and Dale E, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, Kochan Chapman University, Fowler School of Law, Vol 5, Michigan Journal Of Environmental and Administrative Law, 2015, 321 – 324 - <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1039&context=mjeal> – on 2 November 2023

⁷¹ Donald J *et al*, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 321 – 324.

⁷² Donald J *et al*, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 321 – 324.

⁷³ Donald J *et al*, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 321 – 324.

⁷⁴ Donald J *et al*, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 321 – 324.; James Madison, *Property*, National Gazette, Mar. 27, 1792, Reprinted in Lance Banning, *Liberty and Order: The First American Party Struggle*, 2004, 107- 08.

⁷⁵ Donald J *et al*, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 321 – 324.

⁷⁶ Donald J *et al*, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 321 – 324.

even psychological constraints on decision-makers from exercising strong government control over privately owned lands.⁷⁷

These various factors contribute to the proliferation of poverty and the expansion of slums. Therefore, when designing land tenure systems, there is a need to bring innovative forms of tenure, into the current debates involving issues, which address the constraints on livelihoods and natural resources, through the lens of the lower income earners.⁷⁸ Future land laws and policies need to give more attention to present participation in decision-making and actively support their initiatives in determining the types of land rights they need for a specific type of land use and management.⁷⁹

1.8.2 - Different mechanisms used apart from land tilting.

The two main reports that gave the Kenyan government a lens to see the problems that the country was facing post-independence were the Ndung'u report and the Njonjo report.⁸⁰ They sought the need for the formulation of tentative laws that would protect the individuals from having their land grabbed and proper allocation of public land to private individuals.⁸¹ These reports further encouraged various acts of parliament such as the Land Act as well as the Constitution, but the laws were not futuristic, they only focused on the prevailing problem of that time.⁸² Hence, land tilting alone has become an ineffective method when it comes to dealing with the formalisation of property into different tenure systems for the lower income earners.⁸³ According to African scholars, conventional titling programmes have proved to be costly and time-consuming in that it would be impossible to replace customary rights.⁸⁴

⁷⁷Donald J *et al*, A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective, 321 – 324.; Arnold C.A, The Structure of the Land Use Regulatory System in the United States, 22, Michigan Journal of Environmental and Administrative Law, 441, 460, 2007.

⁷⁸ Zhao Y, 'China's Land Tenure Reform: Time for a New Direction?' China Review, fall 2011, Vol. 11, No. 2, 2011, 145 - <https://www.jstor.org> - on 12 January 2023; Augustinus C and Lind E, How to Develop a Pro-poor Land Policy: Process, Guide and Lessons, Nairobi: United Nations Human Settlements Programme, 2007.

⁷⁹ Zhao Y, 'China's Land Tenure Reform: Time for a New Direction?', 145.

⁸⁰ Kieyah J and Mbae-Njoroge C, Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis, Private Sector Development Division Kenya Institute for Public Policy Research and Analysis, KIPPR Discussion Paper No. 119, 2010, 16 - <https://repository.kippra.or.ke/bitstream/handle/123456789/2684/DP119.pdf?sequence=1&isAllowed=y> - on 7 March 2023.

⁸¹ Kieyah J *et al*, Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis, 10.

⁸² Kieyah J *et al*, Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis, 10.

⁸³ Quan J and Toulmin C, Formalising And Securing Land Rights In Africa Overview, International Institute for Environment and Development, 2005, 76 - <https://www.jstor.org> - on 8 March 2023.

⁸⁴ Quan J *et al*, Formalising and Securing Land Rights in Africa Overview, 76.

Moreover, there was little evidence that issuing land titles led to higher rates of agricultural investment and productivity.⁸⁵

For the rural parts of the country, there is a need for the recognition of customary land rights to secure tenure.⁸⁶ This requires both legislative reforms to overcome the duality existing between the formal and informal or customary sectors, and the development of institutions to manage land rights that could link with customary systems of tenure and land management⁸⁷. This would likely involve some form of localised recording and documentation of rights, to protect them from events such as evictions.⁸⁸

Researchers have noted that the informal settlement upgrading programmes in Kenya should develop criteria for selection and prioritization of those settlements that lend themselves to easy upgrading instead of negotiating for land rights in those settlements with complicated land tenure relationships.⁸⁹ Many informal settlements were built on unalienated and unplanned public land.⁹⁰ It has further been realized that some informal settlements in Nairobi don't seem to respond to any upgrading efforts through ratification of ownership.⁹¹ Hence, there is a need for a study to ascertain what factors drive the persistence of informality despite the improved security of land tenure. The government should then amend the Land Act to include alternative and innovative tenure systems that can cater for the interest of the poor in urban areas and enforce rights to easier access to land that is cheap and simple to understand.⁹²

Contribution

This study will contribute to the research on law and development studies in various ways which will show how secure tenure is a fundamental pillar for economic growth in Kenya. It will also serve as a critique of the slum upgrading programmes and what mechanisms can be used best. It will also contribute to property law in the innovation of different forms of tenure to not only look at present circumstances but to look at how the tenure systems themselves are

⁸⁵ Quan J *et al*, Formalising and Securing Land Rights in Africa Overview, 76.

⁸⁶ Quan J *et al*, Formalising and Securing Land Rights in Africa Overview, 76.

⁸⁷ Quan J *et al*, Formalising and Securing Land Rights in Africa Overview, 76.

⁸⁸ Quan J *et al*, Formalising and Securing Land Rights in Africa Overview, 76.

⁸⁹ Omwoma R.M, Land Tenure Systems In The Slum Settlements Of Nairobi: Implications For Slum Upgrading Programmes, Department of lands, ministry of land s and settlement, Registered land management surveyor, institution of Surveyors of Kenya, 2013, 21 - <https://land.igad.int/index.php/documents-1/countries/uganda/gender-7/1239-finalworldbankpaperforpresentation/file> - on 8 March 2023.

⁹⁰ Omwoma R.M, Land Tenure Systems in The Slum Settlements of Nairobi, 21.

⁹¹ Omwoma R.M, Land Tenure Systems in The Slum Settlements of Nairobi, 21.

⁹² Omwoma R.M, Land Tenure Systems in The Slum Settlements of Nairobi, 21..

fluid and transgressional as well as the laws and policies to be formed around the tenure systems.

1.9 - METHODOLOGY

This study will consist of a doctrinal methodology. The study will be a qualitative study which will mostly use secondary information, such as journal articles, working papers, reports, books, and case law. The primary information that will be used will pertain to acts of parliament such as the Land Act, the Constitution, and the National Land Commission. In general, it is expected that the findings would be arrived through a deductive method which will bring the general principles of property rights and focus on secure tenure. It will mainly be desk-based.

The first part will examine the eruption of the problem and its progression throughout the years. It will also look at the developments made towards dealing with homelessness and the measures taken with the law to debunk this issue. Furthermore, it would look at the history behind the slum upgrading programmes and the progress it has made.

The second part will look at the lessons learnt from South Africa. It will show the methods that South Africa has implemented and how they have dealt with their issue with slums and slum upgrading. It will also look at the case law and policies that have supported their slum upgrading programmes and providing housing units.

1.10 - CHAPTER BREAKDOWN

This research proposal will be the first chapter of the study. It will detail certain aspects of the study such as the research objectives, theoretical framework, justification of the study and the methodology to achieve the objectives of this study.

The second chapter will look at the root of the housing crisis and the development of the problem. It will look at the progress that the law has made since colonial times, independence, and post-independence.

The third chapter will look at the laws and various policies implemented towards improving housing and what the state's current approach is doing. It will look at the progression of the slums in Kenya and will look at how the state has managed to deal with it, with the eruption of the slum upgrading project. It will look at the strengths and weaknesses of the slum upgrading project and how other states have achieved their success with the methods they used to implement their policies towards housing.

The fourth chapter will examine how South Africa has implemented policies that have managed to curtail the eruption of slums. It would look at the way that South Africa has designed their law to improve their informal economy by tackling homelessness and the disparities of living in slums. It will further look into how Kenya can apply those laws and how it can design its law to conform with its political economy and social economy as well.

The fifth chapter will be to propose an approach that would be beneficial for the lower income earners and that will enhance the development of Kenya. It will look at how the results from the other countries have been made. It will give recommendations based on the findings from the other chapters.



CHAPTER 2

AN ANALYSIS OF THE DEVELOPMENT AND EVOLUTION OF THE HOUSING CRISIS

2.1 - INTRODUCTION

This chapter will discuss the stages in which the problem of slum mushrooming began and how it has progressed. Furthermore, it will further discuss the type of housing that was first introduced by the colonial masters, whether affordable housing has always been a problem and how long the slum has existed. First, the analysis the key issues where the problem of slum eruption began will be presented in this chapter. Second, it will focus on how various factors have caused slum settlements to become permanent homes for many citizens rather than a temporary setback.

2.2 - A HISTORICAL ANALYSIS OF THE SLUM MUSHROOMING IN KENYA

To fully capture the reality and the complexity of the housing crisis, it is important to look at the development of housing during colonialism, post-independence up to the mid-1970s and the mid-1970s up to the present times. Furthermore, it is important to factor in the period of colonialism since it gives the foundational basis to the rationality of what housing schemes have opted to do.

2.2.1 - The State of Housing During Colonialism

The genesis of the historical developments of most of the slum areas is showcased where the Africans were segregated into native reserves where they were to fend for themselves. The reserves were infertile unlike the land that the White Settlers acquired which are highly fertile and could produce a lot more. Additionally, this segregation was highly racial and favored the Europeans and the Southern Asians, the Indians.⁹³ This left little to no room for the Africans to settle in their own land due to the congestion, overuse and overgrazing of the land.⁹⁴

⁹³ Kanginga K, Kenya experience in Land Reform: the ‘million-acre settlement scheme, 2007 - <https://land.igad.int/index.php/documents-1/countries/kenya/investment-3/645-kenya-experience-in-land-reform-the-million-acre-settlement-scheme/file> – 25 November 2023.

⁹⁴ Kanginga K, Kenya experience in Land Reform: the ‘million-acre settlement scheme, 2.

The White settlers used various forms of systems of land tenure, such as private ownership and leasing land for a period of 99 years which prohibited the access of African soil to the natives.⁹⁵ These different forms of land tenure decreased the chances of Africans acquiring land since the White Settlers arbitrarily imposed the British law instead of taking into account the African Customary law.⁹⁶ Nevertheless, African labor was highly appreciated, through the construction of the Kenya – Uganda railway, therefore some Africans were moved temporarily to urban areas.⁹⁷ With this move there was the fear of insecurity among the Asians and Europeans.⁹⁸

Additionally, there were multiple ways devised to bring in labor from the rural areas into urban centers, while still controlling the flow of Africans into urban centers and the population of Africans in the Native reserves. Notably, one of the mechanisms that the Europeans used was through the Employment of Servants Ordinance.⁹⁹ The Employment Ordinance was enacted to ensure that every employer at all times and at his own expense, either provided proper housing accommodation at the place of employment or the rental income for proper housing accommodation.¹⁰⁰ For this reason, the employed African men who were required to work in urban areas, were relocated to areas that were invariably provided by the employer, the government or parastatals.

The outcome of this was that the condition of the houses that were provided for the Africans were deplorable if not disreputable. The Africans were provided for housing that comprised of blocks of back-to-back rows of cubicles in the form of bed spaces.¹⁰¹ Moreover, the houses

⁹⁵ Atieno-Odhiambo E. S, The Colonial Government, the Settlers and the ‘Trust’ Principle in Kenya 1939, *Trans African Journal of History*, vol. 2, no. 2, 1972, 94–113 - <http://www.jstor.org/stable/24520217> – 25 November 2023.

⁹⁶ Kanginga K, Kenya experience in Land Reform: the ‘million-acre settlement scheme, 2.

⁹⁷ Olumwullah O, A History of African Housing in Nairobi 1900-1960; A study of urban condition and colonial policies, Published L.L.M Thesis, University of Nairobi, 1986, 287 - <http://erepository.uonbi.ac.ke/handle/11295/64270?show=full> –10 January 2024.

⁹⁸ Olumwullah O, History of African Housing in Nairobi 1900-1960; A study of urban condition and colonial policies, 287.

⁹⁹ Alison H, And Richard Harris R, Shauri Ya Sera Kali: The Colonial Regime of Urban Housing in Kenya to 1939, *Urban History*, vol. 34, no. 3, 2007, 504–530 - <http://www.jstor.org/stable/44614627> – 25 November 2023; Cooper, *On the African Waterfront. Urban Disorder and the Transformation of Work in Colonial Mombasa*, New Haven, 48, 1987.

¹⁰⁰ Obudho R and Aduwo G, Slum And Squatter Settlements In Urban Centres Of Kenya: Towards A Planning Strategy, *The Netherlands Journal of Housing and Environmental Research*, Special Issue ‘Housing in the Third World: self-help and governmental programmes’, Vol. 4, No. 1, 1989, 17-29 - <http://www.jstor.org/stable/43932847> – 27 November 2023.; P.M Syagga, Housing Policy and Systems in Kenya: Nairobi’s Experience’, Paper presented to the Post Graduate Centre, Human Settlements, Belgium, 1987, 2-3 - <http://www.jstor.org/stable/43932847> – 25 November 2023.

¹⁰¹ Kanginga K, Kenya experience in Land Reform: the ‘million-acre settlement scheme, 2.

were provided for in insufficient numbers.¹⁰² This meant that they would employ many Africans but failed to accommodate for each one. More importantly, the poor standards were most likely attributed to the fact that Africans had no security of tenure, nor did they have control over the improvements of the living conditions, probably except for those living in private locations and squatter settlements.¹⁰³

While this is the case, the cost of accommodating the native Africans as well as the cost of regulating the Africans posed a challenge.¹⁰⁴ This means that they were to ensure that each African that was employed was provided for housing and that those who were not provided for would reside in the reserves and the rural areas with the rest of the African population.¹⁰⁵ As a result, the employers had to cut costs which led to the Africans moving their families to the urban areas, which meant that additional housing structure were needed.¹⁰⁶ However, given that the population was greatly underestimated, many Africans were still not accommodated for which led them to building their own settlements.

2.2.2 - The post-independence up to 1970 period

Stemming from the plethora of challenges that the colonial government faced, and now passed on to the new Kenyan government, it was realised that there was a serious housing problem. With the help of United Nations Technical Assistance (UNTA), a national housing survey was carried out in 1964. More importantly, this survey was one of the factors that led to the first comprehensive housing policy, the Sessional Paper No. 5 in 1966-67,¹⁰⁷ which had remained the blueprint of Kenya's national policy.

The Government of Kenya and the local authorities concentrated their efforts on the provision of conventional housing for public servants, local authority housing for rental accommodation, and a few mortgage schemes for high-income groups.¹⁰⁸ The outcome, however, was that there were technical and organizational barriers to low-cost construction.¹⁰⁹ Due to this, it left the

¹⁰² Obudho R *et al*, Slum and Squatter Settlements In Urban Centres Of Kenya, 17-29.

¹⁰³ Olumwullah O, A History of African Housing in Nairobi 1900-1960; A study of urban condition and colonial policies, Published L.L.M Thesis, University of Nairobi, 1986, 287 - <http://erepository.uonbi.ac.ke/handle/11295/64270?show=ful> – 10 January 2024.

¹⁰⁴ Atieno-Odhiambo, The Colonial Government, the Settlers, and the ‘Trust’ Principle in Kenya 1939, 94–113; The Africans were regulated through the Kipande system.

¹⁰⁵ Alison H, Shauri Ya Sera Kali, 504–530.

¹⁰⁶ Obudho R *et al*, Slum and Squatter Settlements In Urban Centres Of Kenya, 17-29.; Tysons, G.A, The African Housing Problem, a Memorandum Submitted to the Nairobi Chamber of Commerce, 1953, 16.

¹⁰⁷ Obudho R *et al*, Slum and Squatter Settlements In Urban Centres Of Kenya, 17-29.

¹⁰⁸ Obudho R *et al*, Slum and Squatter Settlements In Urban Centres Of Kenya, 17-29.

¹⁰⁹ Obudho R *et al*, Slum and Squatter Settlements In Urban Centres Of Kenya, 17-29.

majority of the urban population without housing, and as their numbers increased, so did the proliferation of unplanned urban settlements constructed using any form of material and lacking in essential services.

The increase of the slum settlements did not sit well with the government who later on advocated for slum clearances. However, it should be noted that the slum clearance was not only malicious destruction of property worth millions of shillings but also a cause of human suffering and bitterness. Resultantly, it led to a reduction in the number of informal-sector jobs because the destroyed structures were also workplaces of "jua kali" mechanics (small scale artisan workers), woodcarvers, and metal workers, among others.¹¹⁰

The emphasis since the late 1970s has shifted to more pragmatic approaches such as upgrading the slum settlements in addition to encouraging people's initiatives to provide themselves with housing, through the provision of building sites and basic services. However, slums and squatter settlements continue to thrive in most of the major urban centres. Despite the government's efforts to reduce the number of shelters sprouting during this period, more seemed to come up. The government's approach at this time was not as useful as it hoped and in turn, created national outrage and stronger class differences.¹¹¹ The government then took to other approaches such as implementing restrictive policies which eliminated low-income communities, through the exclusion of necessities such a water and electricity.¹¹²

2.2.3 - From the 1970s up to the 2010s era

As stated previously, in the mid-1970s, the government felt the action needed to be taken to eradicate slum settlements was through forced evictions to discourage rural-to-urban migration and also to discourage slums mushrooming. However, this had an effect by creating mistrust between the government and slum dwellers. Most of the affected residents decided to build their own houses made of iron sheets and mud since they could not afford the resources to build their homes.¹¹³

In the 1980s, the government, inspired by the International Monetary Fund, begun the Structural Adjustment programmes (SAP's). This approach advocated for better policies

¹¹⁰ Obudho R *et al*, Slum and Squatter Settlements In Urban Centres Of Kenya, 17-29.

¹¹¹ Obudho R *et al*, Slum and Squatter Settlements In Urban Centres Of Kenya, 17-29.

¹¹² Obudho R *et al*, Slum and Squatter Settlements In Urban Centres Of Kenya, 17-29.

¹¹³ Obudho R *et al*, Slum and Squatter Settlements In Urban Centres Of Kenya, 17-29.

through policy reform.¹¹⁴ What this meant was that there would be less direct donations and rather donations under a policy condition. This seemed to be a hopeful idea to bolster the Kenyan economy, however, due to the governments lack of financing, corruption and increased debt, the Structural Adjustment programmes were short-lived.¹¹⁵ Hence, the government resorted to the previous means of slum eradication.

The residents grew uncertain of the governments' capacity to cater for their needs. Therefore, a residents lead organisation named Muungamano was created.¹¹⁶ People fought (through demonstrations and activism) to secure their homes and businesses and for recognition of the existence of slums and those living in them.¹¹⁷ The objective of the purpose is to work for slums to be improved and for them to be integrated into the city fabric. They also work to influence changes in practice and policy – especially national policy for urban development.¹¹⁸ Supporters of the organisation include Slum Dwellers International, who offer professional and technical support, Kituo Cha Sheria, who offer legal aid services, as well as human rights activists, and Catholic priests.¹¹⁹

Community upgrading programmes have been the most prominent policy from the 2000's.¹²⁰ Slum upgrading projects have been devised as a form of improving the living standards of low-income earners and to ensure that basic services are available to them.¹²¹ Another project that was embarked on was the National Youth Service (NYS) Slum Upgrade Initiative. It engaged young people to build houses and toilets and provide daily cleanup activities in Kibera and other slums across the country.¹²² There was also the Boma Yangu initiative, where applicants can register for free to be applicable to secure a house at a low cost.¹²³ Even though there is a

¹¹⁴ David D and Svensson J, What Explains the Success or Failure of Structural Adjustment Programmes, The Economic Journal, vol. 110, no. 466, 2000, 894–917. - <http://www.jstor.org/stable/2667857> – 9 December 2023.

¹¹⁵ David D *et al*, What Explains the Success or Failure of Structural Adjustment Programmes, 894–917.

¹¹⁶ Obudho R *et al*, Slum and Squatter Settlements in Urban Centres Of Kenya, 17-29.

¹¹⁷ Lines K and Makau J, Taking the long view: 20 years of Muungano wa Wanavijiji, the Kenyan federation of slum dwellers. Environment and Urbanization, 30(2), 2018, 407-424 - <https://journals.sagepub.com/doi/full/10.1177/0956247818785327> – 7 December 2023.

¹¹⁸ Muungano wa wanavijiji - <https://www.muungano.net/about> – 7 December 2023.

¹¹⁹ Lines K *et al*, Taking the long view: 20 years of Muungano wa Wanavijiji, 407-424.

¹²⁰ Nation Africa, Kibaki projects face greatest test of time as regime changes, 2014 updated in 2020 - <https://nation.africa/kenya/life-and-style/smart-company/kibaki-projects-face-greatest-test-of-time-as-regime-changes--959796> – 7 December 2023.

¹²¹ Abaki Z, Factors Influencing the Implementation of the Slum Upgrading Project in Kibera Slums, 8.

¹²² Mwanza K, Efforts to Upgrade Kenya's Slums Undermined by Graft, Lack Of Consultation, 2018 - <https://www.reuters.com/article/idUSL8N1Q4653/> – 9 December 2023.

¹²³ State Department of Housing and Urban Development, Ministry of Lands Housing, Public Works, and Urban Development - <https://www.bomayangu.go.ke/> – 9 December 2023.

clear acknowledgement of the efforts towards supporting low-income earners, these projects are still stifled by various factors that will be further explored in this chapter.

2.3 - FACTORS THAT HAVE CATALYSED THE MUSHROOMING OF SLUMS.

Considering the above accounts on the development of slum areas, it is worth noting that various factors have indeed made major impacts on the ability of slum areas to develop into better facets of housing. This section will discuss four main factors.

On the first issue, financing. This is due to the poor allocation of funds into these projects that need highly intensive funding for infrastructure, planning and construction of these projects.¹²⁴ There is an inability to address the fundamental supply constraints of land, finance and building materials that are needed for these projects to see any light, hence there is a high dependence on external funding.¹²⁵ Furthermore, city authorities do not have the financial and technical resources to fully undertake such resettlement programmes.¹²⁶

Scholars noted that hasty planning allowed for little or no input from beneficiary communities, thereby resulting in a lack of ownership and reluctance to pay for improved services.¹²⁷ Funding is the backbone towards formalising the blueprints and plans into actual structures that create an environment where low-income earners can fend for themselves. Despite singling out this need, the finances needed for these projects are also depleted by the fact that various other projects need funding which causes a strain on the government.

Onto the second issue, the lack of appropriate leadership and administration has narrowed the realisation of these projects. This is because the people living in slum settlements lack civic awareness among the residents. Hence, the majority of the leaders are largely determined by ethnic or regional considerations and are more ethnic figures than people's representatives.¹²⁸ A majority of them are ignorant about slums issues and how to fix them because they lack

¹²⁴ Arimah B, Slums As Expressions Of Social Exclusion: Explaining The Prevalence Of Slums In African Countries, Chief, State of Cities Section City Monitoring Branch United Nations Human Settlements Programme (UN-HABITAT), 7 - <https://www.oecd.org/development/pgd/46837274.pdf> – 10 December 2023.

¹²⁵ Arimah B, Slums as Expressions of Social Exclusion: Explaining The Prevalence Of Slums In African Countries, 7.

¹²⁶ Arimah B, Slums as Expressions of Social Exclusion: Explaining The Prevalence Of Slums In African Countries, 7.

¹²⁷ Arimah B, Slums as Expressions of Social Exclusion: Explaining The Prevalence Of Slums In African Countries, 7.

¹²⁸ Okombo O and Sana O, Taking Stock of Socio-economic Challenges in the Nairobi Slums, Friedrich-Ebert-Stiftung, 2012, 24 - <https://library.fes.de/pdf-files/bueros/kenia/09860.pdf> – 10 December 2023.

sufficient education. The few who have good education serve tribal agendas, always developing survival strategies based on ethnic manipulations.¹²⁹

Onto the third issue, poor to no allocation of slum-upgraded houses is one of the reasons why the target audience or those most in need did not benefit from some of the above-mentioned projects.¹³⁰ This problem highlights the fact that there is poor allotment or selection of the housing units to those who would most benefit from it. This shows a failure to incorporate appropriate strategies in a holistic and inclusive manner.¹³¹

Finally, onto the last issue, the emergence of landlordism within the slum areas. This issue has crippled many people living in these areas who face internalized evictions from landlords. With regards to the real estate market, based on research conducted, investors in Nairobi's low-income rental housing market can realise up to four times better returns than those selling formal middle and high-income housing.¹³² This is based on estimating the rental yield, as well as the payback period, for a rental unit in the informal settlement of Mukuru Kwa Jenga, for example, and another in Nairobi's high-income areas of Kilimani, Karen or Runda.¹³³

2.4 - CONCLUSION

To conclude, the above-mentioned factors are not conclusive but are regarded as some of the main factors that have prevented these projects from becoming a reality. For the slum upgrade projects to be fully realized, there is a need to rehabilitate these projects in a manner that would serve the public, which would create a drawback from landlordism and allow the people to have accessibility to affordable housing.

The need for a better approach towards dealing with the problem of slum mushrooming has plagued the government even before independence. Especially given the history of our country, this problem has been plagued by the lack of financial support and landlordism as some of the factors that have stifled the development of slum shelters into better living environments for

¹²⁹ Okombo O *et al*, Taking Stock of Socio-economic Challenges in the Nairobi Slums, 24.

¹³⁰ Georole Ltd, Challenges of Upgrading Urban Slums, Physical and Land Use Planning, Environment Management, 2023 - <https://georole.co.ke/challenges-of-upgrading-urban-slums/> – 11 December 2023.

¹³¹ Georole Ltd, Challenges of Upgrading Urban Slums, Physical and Land Use Planning, Environment Management, 2023 - <https://georole.co.ke/challenges-of-upgrading-urban-slums/> – 11 December 2023.

¹³² Mwau B, Sverdlík A and Makau J, Urban transformation and the politics of shelter Understanding Nairobi's housing markets, IIED, London, 2020, 50 - <https://www.iied.org/sites/default/files/pdfs/migrate/10876IIED.pdf>– 11 December 2023.

¹³³ Mwau B *et al*, Urban transformation and the politics of shelter Understanding Nairobi's housing markets, 50.

low-income earners. Also, the policies in place should be progressive and coherent with the current situation to be able to cater for the low-income earners needs appropriately.

The next chapter will give a historical analysis of the attempts made by the law to curb the issue of slum mushrooming and encourage healthy living areas. The right to adequate housing is something that should be greatly taken into consideration by the government as well as Kenyans themselves. Therefore, this research posits that the right to housing should be taken more seriously and that more efforts toward curbing the housing issue should not be overlooked.



CHAPTER 3

A LEGAL ANALYSIS ON THE HISTORICAL ATTEMPTS BY THE GOVERNMENT AND THE STATE'S CURRENT APPROACH

3.1 - INTRODUCTION

This chapter will focus on the historical development that the law has taken to improve housing, and access to land and provide better living standards to the public sector. This will begin after independence when the first sessional on housing was introduced, it will then go through the 1970s, to the 1990s. Additionally, it will look at the Ndungu report as well as the Njonjo report and its significance in influencing the laws. Furthermore, it will look at other attempts made before the promulgation of the 2010 constitution. This chapter will further look into the state's current approach to curbing homelessness, that is, it will look at the housing levy and the approach that the government is currently undertaking.

3.2 - POST-INDEPENDENCE THROUGH TO THE 1990S

3.2.1 - Post-independence

The starting point of this discussion is the Swynnerton Plan, which was established to work on two main areas that is; firstly, it attempted to accelerate African production of quality cash crop and livestock, secondly, it proposed to create a democratic institution for the Africans to manage their own agriculture.¹³⁴ This is illustrated where land that was to be administered to the Mau Mau (Freedom fighters) loyalists was held during a state of emergency in 1956, which closed the avenues for the aggrieved landholders and dispossessed peasants.¹³⁵ This was a mechanism used by the colonial government to assist the farmers that were not Mau Mau loyalist and singling out those who did not support the colonial government. Concurrently, the persistence of customary practices and beliefs marginalised women and children from accessing land.¹³⁶

It seemed as though upon independence, the newly inaugurated government attempted to come up with various schemes to benefit the homeless and individuals living in rural areas. This can be seen where a million-acre resettlement scheme was established for the landless and

¹³⁴ Harbeson J W, Land Reforms and Politics in Kenya, 1954-70, The Journal of Modern African Studies, 9, 2, 1971, 231–51 - <http://www.jstor.org/stable/159442> - on 23 Jan. 2024.

¹³⁵ Mbote P, The Land Question in Kenya: Legal and Ethical Dimension, Strathmore University and Law Africa, 2009, 219-246 - <https://www.ielrc.org/content/a0910.pdf> - on 23 Jan. 2024.

¹³⁶ Mbote P, The Land Question in Kenya: Legal and Ethical Dimension, 219-246.

unemployed Africans.¹³⁷ It was argued that land development was necessary for the economic growth of the country. However, rather than use the land resettlement scheme in the rural areas, they were left with the responsibility of building their own houses.¹³⁸

In addition, evidence shows the lack of policies to ensure there was a control of population movement. This is seen through the robust increase in rural-to-urban migration.¹³⁹ Families and individuals who moved in the urban areas lacked employment and their basic needs were barely being met.¹⁴⁰ With many jobless, finding secure tenure proved to be a challenge leading them to find or build their own houses.¹⁴¹ In attempts to clear up some of these areas, the Nairobi City Council would periodically tear down these 'shanty towns', however they seemed to rise just as quickly as they were torn down.¹⁴²

Consequently, instead of confiscating land taken from nearly all Kenyan ethnic groups by the colonial government, the new government required the original inhabitants to buy it back.¹⁴³ This devastated the many Kenyans who lacked the financial resources to buy back their land. As an alternative, President Jomo Kenyatta encouraged Kenyans to stay in the rural areas. Specifically, he called for “Turudi Mashambani,” which means let us go back to the rural areas in Kiswahili.¹⁴⁴ However, this had little to no impact in the sense that not much effort was made by the people and more people became homeless due to the evictions.

The government looked into public housing having realised that the possibility of completely controlling the swelling poor population was out of reach.¹⁴⁵ This was encouraged by the first official housing policy, Session Paper No.5 of 1966/7, titled “Housing Policy in Kenya.¹⁴⁶ Through this policy, the National Housing Corporation (NHC) whose primary mandate was to

¹³⁷ Harbeson J.W, Land Reforms and Politics in Kenya, 1954-70, *The Journal of Modern African Studies*, vol. 9, no. 2, 1971, 231–51 - <http://www.jstor.org/stable/159442> - on 23 January 2024.

¹³⁸ Harbeson J.W, Land Reforms and Politics in Kenya, 231– 251.

¹³⁹ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, Published L.L.M Thesis, College of St. Benedict/St. John's University, 2004, 409 - https://digitalcommons.csbsju.edu/honors_theses/409 - on 23 January 2024.

¹⁴⁰ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409.

¹⁴¹ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409.

¹⁴² Werlin H, Nairobi's Politics of Housing, *The African Review: A Journal of African Politics, Development and International Affairs*, vol. 3, no. 4, 1973, 611–29 - <https://www.jstor.org/stable/45341304?seq=1> - on 23 January 2024.; *East African Standard (E.A.S.)*, 22 May 1964

¹⁴³ Boone C, Land Conflict and Distributive Politics in Kenya, *African Studies Review*, vol. 55, no. 1, 2012, 75–103 - <http://www.jstor.org/stable/41804129> - on 23 Jan. 2024.

¹⁴⁴ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409.

¹⁴⁵ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409.

¹⁴⁶ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409.

implement the Government's Housing Policies and Programmes.¹⁴⁷ This policy was not manifested in a positive light since evictions were more rampant. This is illustrated where the Nairobi City Council authorized the destruction of forty-nine illegal settlements, containing perhaps 40,000 people.¹⁴⁸

3.2.2 - 1970 – 1990

With slum eradication on the rise and the order of the day, the Nairobi City Council could not cope with a vast burgeoning of shanties and other forms of unauthorized construction. The justification for the slum clearance was that it was supported by the Public Health Act of 1930 as a health hazard for the people living in those areas, however, this same justification is in contrast with the human rights conversation that was geared towards protection of these persons living in slum areas. In the early 1970's, the rate of housing construction in relation to the population growth was slower.¹⁴⁹ In other words, the supply of approved housing was at such a low rate as compared to the pace of population increase, which was far below the demand rate.

Conventionally, the government fostered relationships with the World Bank and international organizations. This sparked a phase known as the provision of minimal services.¹⁵⁰ Through these relationships, the government embarked on new development strategies, mostly based on multilateral partnerships centring on international donor funding. It encouraged the establishment of the Kenya National Slum Upgrading program, where the KENSUP document extends to the “extension of tenure security and physical upgrading phase”.

The two most widely supported strategies were the site and service scheme and the slum upgrading scheme.¹⁵¹ With regards to the site and service scheme, the government simply provides open serviced plots of land ready for residents to build their own houses, while the World Bank and international donors provide funding to the governments to buy land and

¹⁴⁷ National Housing Corporation - <https://www.nhckenya.go.ke>.

¹⁴⁸ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409; Herbert W, The Slum Upgrading Myth, *Urban Studies*, 36, 9, 1999, 1523.

¹⁴⁹ Werlin H, Nairobi's Politics of Housing, Memorandum on Nairobi City Council Housing Stock Nairobi Urban Studies Group, *The African Review: A Journal of African Politics* 1972, 611–29.

¹⁵⁰ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409.

¹⁵¹ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409; Syagga, Paul M, Mitullah W, and Gitau S, Government of Kenya (GoK) and United Nations Centre for Human Settlements (UNCHS), *Slum Upgrading Initiative: Nairobi Situation Analysis (NSA), Consultative Version*. Nairobi: GoK & UNCHS, 2001.

install services. This was made possible through self-help Harambee fundraising and small loans for new upgraded housing materials granted by the government or other organizations.¹⁵²

Slum upgrading on the other hand focused on the government's role in improving the environment in pre-existing communities and providing for resident's basic needs instead of full housing provision.¹⁵³ It involves improving public services and infrastructure such as access to safe water, waste disposal, sewer, and possibly roads. The outcome was that there would be secure and official land tenure, which took various forms ranging from individual to community land title and renting or owning schemes.

Not long after the strategies commenced when they faced challenges. Some of these include the government being largely unable to provide the conditions necessary to provide for the large-scale success of the aided self-help housing policy schemes. Additionally, the site and service scheme were unable to help a large number of people in Kenya due to the lack of open land around urban centres – a requirement of this strategy. The inherited outdated land policies that proved too difficult to change continued to plague the country.¹⁵⁴

During the 1980s, the government introduced Structural Adjustment Programs (SAPs).¹⁵⁵ Even though this was intended bring hope, the major burden was the informal settlements, that ultimately received little if any actual benefit from the SAPs. Furthermore, the SAPs were less people-focused and focused more on making profits.¹⁵⁶

Around the early and mid-1990s, the government made government changes that are reflected in the Sessional Paper on Economic Management for Renewed Growth.¹⁵⁷ This paper showed the importance of the informal sector. In effect, it led to the policy document entitled 'National Housing Strategy for Kenya', where the government gives directives to offer more moderate

¹⁵² Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409.

¹⁵³ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409.

¹⁵⁴ Ehresmann P, Nairobi's Housing Crisis: An Analysis of the Kenya Slum Upgrading Programme, 409.

¹⁵⁵ Mwangi K.I, Urban Development and Planning Law in Kenya: The Case of Nairobi City and bordering Urban Areas, Published L.L.M Thesis, University of Waterloo, Ontario Canada, 1994, 44 -

<https://land.igad.int/index.php/documents-1/countries/kenya/urbanization-3/847-urban-land-development-and-planning-law-in-kenya/file> - on 25 January 2024.

¹⁵⁶ Mwangi K.I, Urban Development and Planning Law in Kenya: The Case of Nairobi City and bordering Urban Areas, 44.

¹⁵⁷ Mitullah W, State Policy And Urban Housing In Kenya: The Case Of Low Income Housing In Nairobi, Unpublished L.L.M Thesis, University of York Institute of advanced Architectural Studies, June 1993, 66 - 68 - <https://core.ac.uk/download/pdf/42604286.pdf> - on 25 January 2024.

subsidies, to facilitate the development of housing by private entities and the charges of their rates.¹⁵⁸

Another essential policy was the Sessional Paper On National Housing Policy For Kenya.¹⁵⁹ This paper showed the progress that was taken from the previous sessional paper and it gave further recommendations for the government to consider given the changes that occurred economically and within the capacity of the state.¹⁶⁰ Also, in 1998, there was the Akiwumi Commission report where it was inquiring into repeated tribal clashes where some of these clashes were politically motivated and linked to land grievances and ethnicity.¹⁶¹

3.2.3 - The 21st century

Some of the key aspects of this period showed the need for the Ndungu report and the Njonjo report. This shook Kenya in the sense that so many injustices were allowed and left unspoken of. The plight of corruption demonstrated was ghastly, appalling, and heinous. In the period of 1990 to 2002,¹⁶² there were reports of mass land grabbing. Most of the land was owned by the government, was given to specific individuals without due regard of the original owners, the squatters who were pushed to reserves.¹⁶³ One of the most prevalent cases of land grabbing is through the Karura forest. Land grabbing was demonstrated where some of the Forestry officials were given quite notices, which entailed huge tracks of the forest land where the forests were chopped, and the land fenced.¹⁶⁴ If it were not for the heroic acts for Wangari Maathai, we would not have the beautiful flora and fauna that is what encapsulates the nature in our city.

Given that the Njonjo report and the Ndungu report exasperated the plight of land grabbing and corruption in the country. These two reports document some of the major causes and the most

¹⁵⁸ Mitullah W, State Policy And Urban Housing In Kenya: The Case Of Low Income Housing In Nairobi, 66 - 68.

¹⁵⁹ Sessional Paper On National Housing Policy For Kenya - <https://repository.kippra.or.ke/bitstream/handle/123456789/574/Sessional%20Paper%20on%20National%20Housing%20Policy%20for%20Kenya.pdf?sequence=1&isAllowed=y> - on 15 January 2024.

¹⁶⁰ Sessional Paper On National Housing Policy For Kenya - <https://repository.kippra.or.ke/bitstream/handle/123456789/574/Sessional%20Paper%20on%20National%20Housing%20Policy%20for%20Kenya.pdf?sequence=1&isAllowed=y> - on 15 January 2024.

¹⁶¹ Bassett, E, Reform, and resistance: The political economy of land and planning reform in Kenya, *Urban Studies*, 57(6), 1164-1183, 2020 - <https://doi.org/10.1177/0042098019829366> - on 15 January 2024.

¹⁶² Manji A, The Grabbed State: Lawyers, Politics and Public Land in Kenya, *The Journal of Modern African Studies*, vol. 50, no. 3, 2012, 467-92 - <http://www.jstor.org/stable/41653718> - on 8 February 2024

¹⁶³ Manji A, The Grabbed State: Lawyers, Politics and Public Land in Kenya, 467-92.

¹⁶⁴ Klopp, J, Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya, *Africa Today*, 47, no. 1, 2000, 7-26 - <http://www.jstor.org/stable/4187305>. - on 8 February 2024.

likely reasons for homelessness. The Njonjo report is the report of the Commission of Inquiry into the Land Law System of Kenya.¹⁶⁵ Some of the issues that were highlighted were to do with the national land policy as constitutional issues, land tenure issues, land administration issues, institutional framework, and land use management issues.¹⁶⁶

On the other hand, the Ndung'u report was constructed by the Commission of Inquiry to investigate the illegal and irregular allocation of public land in Kenya.¹⁶⁷ The Ndung'u Commission's findings showed that these illegal and irregular acquisitions of land are strategically prepared by those entrusted as custodians, through the abuse of allocation.¹⁶⁸ This meant that in practice, allocations of land tracks were done in favour certain individuals, behind closed doors. The Ndung'u Report estimated around 200,000 illegal land titles were issued in the decades after Independence.¹⁶⁹ Although the implementation of the Commission's recommendations was stifled, the mere existence of this report sparked a need for reform in the Country. This can be seen in the case of *Mureithi v Attorney General (2006)*,¹⁷⁰ where the Court of Appeal held that it was not within the courts power to implement law and that it was within the authority of legislature and executive.

Given the perplexity of the problems that the two abovementioned reports portray, there was a need for better housing policies and better approaches towards dealing with the provision of housing for the homeless and improvement of the informal settlements. Hence, in the next sessional paper, the sessional paper no 3 of 2004,¹⁷¹ it intended to address the deteriorating housing conditions countrywide and to bridge the shortfall in housing stock particularly in urban areas. It was noted that in urban areas, the shortage in housing is manifested in

¹⁶⁵ Arika A, TJRC, Ndung'u & Njonjo led Commissions; What Their Reports Had On Lamu And Whether They Have Any Impact On LAPSSSET, Baseline Survey of Human Rights Violations along the LAPSSSET Corridor: A Study of Lamu County, p1-6 - <https://www.academia.edu/17174947/> - on 7 January 2024.

¹⁶⁶ Arika A, TJRC, Ndung'u & Njonjo led Commissions: What Their Reports Had On Lamu And Whether They Have Any Impact On LAPSSSET, 1-6.

¹⁶⁷ Arika A, TJRC, Ndung'u & Njonjo led Commissions: What Their Reports Had On Lamu And Whether They Have Any Impact On LAPSSSET, 1-6.

¹⁶⁸ Manji A, The Grabbed State: Lawyers, Politics and Public Land in Kenya, 467-92.

¹⁶⁹ Bassett, E, Reform, and resistance: The political economy of land and planning reform in Kenya, 1164-1183; Ndung'u Commission, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land. Nairobi: Republic of Kenya, 2004.

¹⁷⁰ John Peter Mureithi & 2 Others V Attorney General & 4 Others [2006] eKLR - <http://kenyalaw.org/caselaw/cases/view/21482>

¹⁷¹ Ministry of Lands and Housing, Sessional Paper No. 3 of 2004 on the National Housing Policy for Kenya, 2004 - <https://repository.kippra.or.ke> - on 20 January 2024.

overcrowding and, the proliferation of slums and informal settlements,¹⁷² while in rural areas, the shortage manifests itself in the mediocre quality of the housing fabric and lack of basic services such as clean drinking water.¹⁷³

In 2007, the Housing Act was repealed to cater for better housing allocation. It aimed at creating an institution that would be a one-stop housing delivery agent on behalf of the government.¹⁷⁴ The next sessional paper is the sessional paper no 3 of 2009,¹⁷⁵ which addresses and recommends the framework for many constitutional changes through the establishment of an independent commission known as the National Land Commission, categories of land, rights of ownership, and addressing historical injustices. It also pans out the principles of land use planning. Fortunately, in August 2010, Kenyans voted to adopt a new Constitution. Kenya's institutional landscape took a dramatic shift. These reforms emphasised transparency, accountability and greater community participation in land planning and administration.¹⁷⁶

3.3 - THE STATE'S CURRENT APPROACH

In the 2020s, the Government implemented the five pillars in the Bottom-up Economic Transformation Agenda (BETA) with housing and settlement as one of the pillars.¹⁷⁷ The main aim is to create an economic opportunity through a change of mindset, by looking at the housing crisis as an opportunity and a gap in the market.¹⁷⁸ Investors are to seek this opportunity by covering a targeted number of supplies for new houses. Developers only build 50,000 units, with 49,000 units targeting the upper-middle and high-end market segments.¹⁷⁹

¹⁷² Nabutola W, Affordable Housing in Kenya: A Case Study of Policy on Informal Settlements, Kenya, 12-14 - https://www.humanitarianlibrary.org/sites/default/files/2013/07/ts_01_2_nabutola.pdf - on 20 January 2024.

¹⁷³ Nabutola W, Affordable Housing in Kenya: A Case Study of Policy on Informal Settlements, 12-14.

¹⁷⁴ Ochieng, C, A Critical Review of Housing Delivery in Nairobi: Different Actors-Different Socio-Economic Groups. Arch net-IJAR: International Journal of Architectural Research, 2007 - <https://www.researchgate.net/publication/26502837> - on 21 January 2024; Government of Kenya, Draft Housing Bill 2006, Ministry of Housing, Nairobi, Kenya, 2006.

¹⁷⁵ Bassett, E, Reform, and resistance: The political economy of land and planning reform in Kenya, 1164-1183.

¹⁷⁶ Bassett, E, Reform, and resistance: The political economy of land and planning reform in Kenya, 1164-1183.

¹⁷⁷ Centre of Affordable Housing in Africa, Affordable Housing and Housing Finance in Kenya, Africa Housing Finance Yearbook, 2023 - <https://housingfinanceafrica.org/countries/kenya/> - on 24 January 2024.

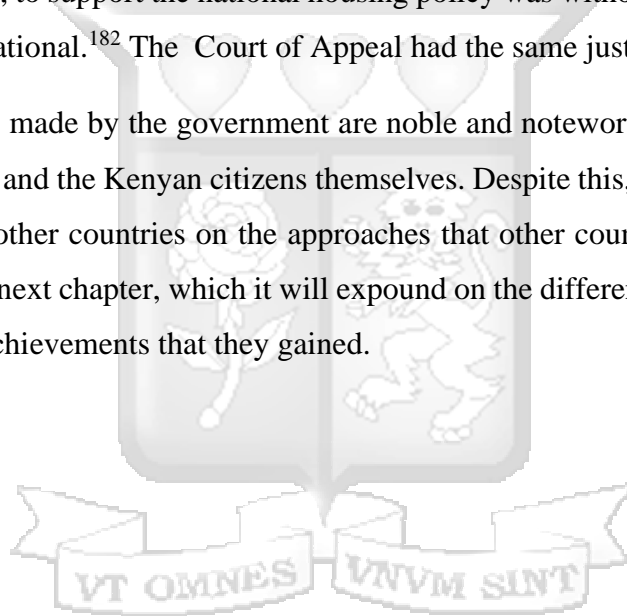
¹⁷⁸ Centre of Affordable Housing in Africa, Affordable Housing and Housing Finance in Kenya, Africa Housing Finance Yearbook, 2023 - https://housingfinanceafrica.org/countries/kenya/#_ftn5 - on 24 January 2024; Parliament of Kenya, The Bottom-up Economic Transformation Agenda, 2022, 12-13.

¹⁷⁹ Centre of Affordable Housing in Africa, Affordable Housing and Housing Finance in Kenya, Africa Housing Finance Yearbook, 2023 - https://housingfinanceafrica.org/countries/kenya/#_ftn5 - on 24 January 2024; Habitat for Humanity International, Research on systemic barriers towards access and usage of housing finance in Kenya, 8, August 2023.

To more recent events, in 2023, the government introduced a Housing levy which many Kenyans criticised, to put an end to this housing crisis. These contributions were introduced by the Finance Act of 2018, through which it bracketed the salaries payable to this fund. Furthermore, it allowed low-income earners, whom are below the tax relief bracket of Ksh 2400, to be exempt from these payments.¹⁸⁰

The housing levy matter was taken to the High Court where the court held that the introduction of the Housing Levy through amendment of the Employment Act by Section 84 of the Finance Act, 2023 lacks a comprehensive legal framework in violation of Articles 10, 201, 206 and 210 of the Constitution.¹⁸¹ More importantly, the High Court judges held, on discriminatory grounds, that imposing it against persons in formal employment to the exclusion of other non-formal income earners, to support the national housing policy was without justification, unfair, discriminatory and irrational.¹⁸² The Court of Appeal had the same justification.¹⁸³

Although the attempts made by the government are noble and noteworthy, they are causing a strain on the economy and the Kenyan citizens themselves. Despite this, the government could borrow from various other countries on the approaches that other countries have taken. This will be covered in the next chapter, which it will expound on the different approaches taken by other states, and the achievements that they gained.



¹⁸⁰ Marindany J and Seur A, All You Need to Know About the Housing Levy, LexgroupAfrica, 2023 - <https://lexgroupafrica.com/index.php/notices-publications/59-all-you-need-to-know-about-the-housing-levy> on 20 January 2024.

¹⁸¹ Kiplagat S, Win For Ruto as Court Okays Collection of Housing Levy, January 4, 2024 - <https://ntvkenya.co.ke/news/win-for-ruto-as-court-okays-collection-of-housing-levy/> - on 20 January 2024.

¹⁸² Kiplagat S, Win For Ruto as Court Okays Collection of Housing Levy, January 4, 2024, <https://ntvkenya.co.ke/news/win-for-ruto-as-court-okays-collection-of-housing-levy/> - on 8 February 2024.

¹⁸³ Kiplagat S, Court of Appeal stops Ruto from collecting housing levy, January 26, 2024 - <https://nation.africa/kenya/news/court-of-appeal-stops-ruto-from-collecting-housing-levy-4503876> - on 8 February 2024.

CHAPTER 4

BORROWED LESSONS FROM SOUTH AFRICA

4.1 - INTRODUCTION

This chapter will give a comparative analysis between South Africa and Kenya. It should be recognized that the countries chosen are countries that Kenya can emulate. Kenya is an aspiring lower middle-income country that has the potential to grow. The approaches taken by South Africa should be appreciated by both the legislature and the national courts when handling with cases to do with evictions and slum relocation. This chapter should offer an insight on the precautions that the government should take when implementing housing policies and strategies. Therefore, this chapter will begin by elaborating the different forms of housing, which are public housing or affordable housing, and social housing. These are forms of housing that various countries have adopted and are continuing to use.

4.2 - DIFFERENT FORMS OF HOUSING

4.2.1 - Public Housing

These are known to be government schemes, where properties are offered at below market value for rent or for sale.¹⁸⁴ Their main objective is to assist individuals who lack the capability to rent or buy property. The different forms of tenure under this form of housing include shared ownership, rent to buy, intermediate rent and social rented housing.¹⁸⁵ This type of housing requires the coming together of both the community and the government to work hand in hand for maintenance and providing the houses with the necessary utilities. This type of housing is mostly occupied by low-income earners and especially those who may not have other alternatives of accommodation options. This includes those who have recently experienced homelessness, family violence or have other special needs.

4.2.2 - Social Housing

This form of housing involves subsidized short term and long-term housing.¹⁸⁶ It can be integrated in the form of public housing, which is managed by the state or community housing,

¹⁸⁴ PLS Solicitors, What is the difference between Affordable Housing and Social Housing? - <https://www.pls-solicitors.co.uk/affordable-housing-and-social-housing> - on 13 February 2024.

¹⁸⁵ PLS Solicitors, What is the difference between Affordable Housing and Social Housing? - <https://www.pls-solicitors.co.uk/affordable-housing-and-social-housing> - on 13 February 2024.

¹⁸⁶ Social Housing: Characteristics and Cases of Study, 2018 - <https://www.mchmaster.com/news/social-housing-characteristics-and-cases-of-study/> - on 13 February 2024.

which is managed by non-profit organisations. Social housing involves renting or selling of property at prices that are not ruled by the market, but by the economic capacity of interested tenants.¹⁸⁷ For example, in Australia, it has mainly been used by low-income earners, and the people who often have experienced homelessness, family violence or other complex needs.¹⁸⁸

In this segment, rents can be based on different reasonings, some of which include market based, cost based, income based, and utility based. These different forms of offering rent allows low and low-middle income households to access appropriate housing. Based on national averages, mainly based on capital cities, the gap between social rents and market rents varies widely across countries.¹⁸⁹

For a person to be considered eligible to receive such an allowance on rent, the necessary information for their consideration would be relating to household income, citizenship/residency status, household size and composition, and a household's current housing situation.¹⁹⁰ Additionally, the citizenship or permanent residency status is required in some countries, but exemptions for some refugees exist for example in Norway, which could also apply in Kenya since it is known to harbour many refugees.¹⁹¹ When the registration for social housing is completed, there is a criterion that is used to determine the order of allocating to different applicants.

The general characteristics of the people who living in slum settlements mostly constitute of having low incomes that could be attributed to long periods of unemployment and/ or intermittent employment.¹⁹² Also, when employed, they hold jobs at the lowest levels of skill

¹⁸⁷ Social Housing: Characteristics and Cases of Study, 2018 - <https://www.mchmaster.com/news/social-housing-characteristics-and-cases-of-study/> - on 13 February 2024.

¹⁸⁸ Ahuri, What is the difference between Social Housing and Affordable Housing – and why do they matter?, 2023 - <https://www.ahuri.edu.au/analysis/brief/what-difference-between-social-housing-and-affordable-housing-and-why-do-they-matter> - 15 February 2024.

¹⁸⁹ OECD Directorate of Employment, Key Characteristics Of Social Rental Housing, Labour and Social Affairs - Social Policy Division, 2022 - <https://www.oecd.org/els/family/PH4-3-Characteristics-of-social-rental-housing.pdf> - 15 February 2024.

¹⁹⁰ OECD Directorate of Employment, Key Characteristics Of Social Rental Housing, Labour and Social Affairs - Social Policy Division, 2022 - <https://www.oecd.org/els/family/PH4-3-Characteristics-of-social-rental-housing.pdf> - 15 February 2024.

¹⁹¹ OECD Directorate of Employment, Key Characteristics Of Social Rental Housing, Labour and Social Affairs - Social Policy Division, 2022 - <https://www.oecd.org/els/family/PH4-3-Characteristics-of-social-rental-housing.pdf> - 15 February 2024.

¹⁹² Leviten R.C, MacDonald M, Matthew R, Public housing, market rentals, and neighbourhood characteristics, 66, 2, 2021, 263-277- <https://onlinelibrary.wiley.com/doi/full/10.1111/cag.12706> - 15 February 2024.

which puts them in a specific category of income.¹⁹³ Another characteristic would be that there would be family and interpersonal issues such as high rates of divorce, desertion, or separation, causing high incidences of female headed homes.¹⁹⁴ Furthermore, there is the sense of helplessness and low sense of personal efficacy, dogmatism and authoritarianism in political ideology, fundamentalist religious views with some strong inclinations toward belief in magical practices.¹⁹⁵

Offering different forms of housing to the people living in slum settlements could not only be life changing, but also essential for their healthy living environment and better prospects of sustaining and managing public and social housing.

4.3 - SOUTH AFRICA

Kenya and South Africa are both thriving African countries; however, one is more developed than another. In terms of their legal frame work, South Africa has included housing as a right under article 26 where it states ‘Everyone has the right to have access to adequate housing,¹⁹⁶ in article 26(2) it further states that ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right’,¹⁹⁷ and in 26(3) it is reiterated that ‘No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.¹⁹⁸

In addition, the department the specifically deals with homelessness, informal settlements and human settlements is the Department of Human Settlements.¹⁹⁹ Its mandate is to ensure that the national policy norms and standards are adhered to. It also prescribes national housing delivery goals and oversees provincial performance to ensure that the national targets have

¹⁹³ Leviten R.C, MacDonald M, Matthew R, Public housing, market rentals, and neighbourhood characteristics, 263-277.

¹⁹⁴ Leviten R.C, MacDonald M, Matthew R, Public housing, market rentals, and neighbourhood characteristics, 263-277.

¹⁹⁵ Shalala D, Simones L, US Department of Housing and Urban Development, Social and Economic Characteristics of Residents of Public Housing, 1979 - <https://www.huduser.gov/portal/Publications/pdf/HUD-050660.pdf> - on 18 February 2024.

¹⁹⁶ Section 26 (1), Constitution of South Africa, 1996.

¹⁹⁷ Section 26 (2), Constitution of South Africa, 1996.

¹⁹⁸ Section 26 (3), Constitution of South Africa, 1996.

¹⁹⁹ Department of Human Settlements, , Republic of South Africa, South African Government, Human Settlements - <https://www.gov.za/about-sa/humansettlements> - on 20 February 2024.

been reached. Where certain goals have not been met, the department offers support in the implementation of human settlement projects.²⁰⁰

Some of the policies and endeavours that the department has sought to achieve are that all subsidies' houses will be provided for solar panels and rainwater harvesting devices.²⁰¹ It also accommodates persons with disabilities by fitting burglar bars in their houses. Moreover, there are several other objectives that the department has set which include developing integrated human settlements, upgrading informal settlements, facilitating affordable housing and delivery of title deeds to the housing beneficiaries. The financing and regulation of the department has been supported through the National Housing Finance Corporation, Finance linked individual subsidiary programmes.²⁰² Furthermore, regulation and registration of person is conducted through the national home builder's registration council, property practitioners' regulatory authority, housing development agency and social housing regulatory authority, which are under the department of Human Settlements.²⁰³

Subsequently, South Africa has also developed in terms precedent supporting the relocation and supporting the slum settlers. This can be seen in the cases of Grootboom case, Olivia Road case and Joe Slovo.²⁰⁴ The courts are viewed as accountability structures that ensure that the people's rights are upheld. Other accountability structures include the South Africa Human Rights Commission.

In the Grootboom case,²⁰⁵ it shed light on the right to housing as a constitutional right but specified on evictions. The court in this case held in favour of the evicted persons as it affirmed its position on the right to adequate housing is a constitutional right which should be read

²⁰⁰ Department of Human Settlements, , Republic of South Africa, South African Government, Human Settlements - <https://www.gov.za/about-sa/humansettlements> - on 20 February 2024.

²⁰¹ Department of Human Settlements, , Republic of South Africa, South African Government, Human Settlements - <https://www.gov.za/about-sa/humansettlements> - on 20 February 2024.

²⁰² Department of Human Settlements, , Republic of South Africa, South African Government, Human Settlements - <https://www.gov.za/about-sa/humansettlements> - on 20 February 2024.

²⁰³ Department of Human Settlements, , Republic of South Africa, South African Government, Human Settlements - <https://www.gov.za/about-sa/humansettlements> - on 20 February 2024.

²⁰⁴ Chenwi L, A Road to Home: The Right to Housing in Canada and Around the World, Implementation of Housing Rights in South Africa: Approaches and Strategies, Journal of Law and Social Policy, Article 4, Volume 24, 2015, 71 - 78 - <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1209&context=jlsp> - on 21 February 2024.

²⁰⁵ Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 at paras 23-24 [Grootboom]; Chenwi L, A Road to Home: The Right to Housing in Canada and Around the World, 71 - 78.

together with the socio-economic rights. Additionally, the state is obligated to act in order to meet the needs of those living in the extreme conditions of poverty or homelessness. This is defined in their constitution under article 26 (2) of the South African Constitution,²⁰⁶ where it states that the state should take reasonable measures to ensure that there is availability of the resources necessary to supplement their needs as well as appropriate measures needed to ensure that their needs are met.

This case mostly highlighted the need to take precaution when evicting homeless people. It highlighted that there should be reasonableness when evicting a person as defined by their constitution under article 26(3).²⁰⁷ Additionally, due to their history of discriminatory laws during the apartheid regime, they recognised the need for more secure tenure and the need to protect the homeless. Therefore, they enacted two acts: namely the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 (PIE Act).²⁰⁸ This act ensure that evictions do not take place arbitrarily but take place in a manner that in consistent with the values of the constitution under article 26 (3). The Extension of Security of Tenure Act 62 of 1997 (ESTA),²⁰⁹ ensures that there is no discrimination in terms of accessing secure tenure among the different groups living in South Africa.

The Olivia roads case,²¹⁰ and the Joe Slovo case,²¹¹ both give meaning to what constitutes meaningful engagement. Meaningful engagement entails consultation between the parties to a case when upholding housing rights as well as socio-economic rights. This has been used to adopt and implement measures necessary to realise housing rights. Through the use of meaningful engagement, the courts exercise their powers which allows for democratic consultation and dialogue in housing rights enforcement, as well as ensuring that a negative court ruling is not upheld.

In the cases of Olivia Road case, it involved reconciliation with respect to inadequate accommodation which people living in the margins have secured for themselves. In addition, the statutory obligation of the local authorities to ensure that the conditions on the

²⁰⁶ Article 26(2), Constitution of South Africa, 1996, No 108 of 1996.

²⁰⁷ Article 26(3), Constitution of South Africa, 1996, No 108 of 1996.

²⁰⁸ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998.

²⁰⁹ Extension of Security of Tenure Act 62 of 1997.

²¹⁰ *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* [2008] 5 BCLR 475 (CC); Chenwi L, *A Road to Home: The Right to Housing in Canada and Around the World*, 71 – 78.

²¹¹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] 9 BCLR 847 (CC); Chenwi L, *A Road to Home: The Right to Housing in Canada and Around the World*, 71 – 78.

accommodation do not constitute a threat to the safety of these persons. This case involved the need for the local authorities to ensure that the type of housing offered to the people was safe and ensured that there is a sound mechanism of delegating with issues to do with the failure to uphold their constitutional rights. Through the use of lawyers, meaningful engagement was able to be used as a means of mitigating the differences between the two parties and ensuring that all their concerns were aired out.

In the Joe Slovo case, the case involved a large community who approached the court to halt their evictions from their homes. They stated that the community was not against the housing development but rather the approach taken by the developers, the housing allocations, and the reality that not all would benefit from the slum upgrading. Meaningful engagement was used especially where precautions have been substantively articulated and a reporting obligation placed on the parties in relation to the engagement process.²¹²

It should also be stated that the People's housing process (PHP) is amongst the successful housing projects that can be added to South Africa's portfolio. This form of housing provided subsidies to low-income households in order to implement community-driven housing projects.²¹³ It involves the direct involvement of beneficiaries in the decision-making process, by allowing them to work together and pool their resources to contribute to building their homes. The goal is to bring communities together, to allow the people to grow their capital and to build more efficient houses. The state's role is purely facilitative since this initiative is community driven. With success, the stakeholders have been able to deliver over 4 million housing units. In order to achieve this, various approaches were taken.²¹⁴ For example, the market-oriented perspective which allowed the private sector to engage with the building of these houses where the government is unable to provide. This is conducted through the shifting responsibilities with other stakeholders who concentrate on providing other services such as affordable loans, subsidies, and affordable building technologies.²¹⁵

²¹² Chenwi L, *A Road to Home: The Right to Housing in Canada and Around the World*, 71 – 78.

²¹³ Zama Mgwayu, *Khayelitsha People's Housing Process* - [https://housingfinanceafrica.org/app/uploads/2021/10/01-South-Africa -Khayelitsha-Peoples-Housing-Process-June-2021.pdf](https://housingfinanceafrica.org/app/uploads/2021/10/01-South-Africa-Khayelitsha-Peoples-Housing-Process-June-2021.pdf) - on 13 March 2024.

²¹⁴ Gumbo T and Onatu G, *Interrogating South Africa's People's Housing Process: Towards Comprehensive Collaborative and Empowering Aided Self-Help Housing Approaches*, Department of Town and Regional Planning, University of Johannesburg, South Africa, 4 - <https://s3.eu-central-1.amazonaws.com/eu-st01.ext.exlibrisgroup.com/> - on 13 March 2024.

²¹⁵ Gumbo *et al*, *Interrogating South Africa's People's Housing Process: Towards Comprehensive Collaborative and Empowering Aided Self-Help Housing Approaches*, 4.

Despite this progress, there are a number of challenges that are pulling South Africa behind. Some of which include, the increased rent charges.²¹⁶ With the increased rent charges not equal to the monthly income of some of the homeowners, it becomes difficult to be able to pay for rent on time and fend for themselves. Additionally, South Africa is facing a housing backlog.²¹⁷ The rapid urbanisation rates are causing a strain on the ability to meet the basic needs of the homeless. Also, there are some land constraints when it comes to urban areas since there are more people than the housing available. Therefore, some people would opt for underdeveloped buildings and substandard housing.²¹⁸ Another challenge is there is still the difficulty in achieving the non-racial segregated society with the heavy presence of inequality.²¹⁹ This is due to the fact that the (overwhelmingly black) poor majority population is disproportionately denied adequate housing opportunities and basic amenities. Therefore, many poor households are unable to attain adequate housing, resulting in them having to live in difficult conditions, such as poor access to water and shelter, in the informal settlements.

4.4 - A COMPARISON BETWEEN KENYA AND SOUTH AFRICA'S HOUSING POLICIES

This section will compare Kenya and South Africa in terms of the recent policies and approaches that each country has undertaken as well as the approach the courts in South Africa has taken as compared to the approach the Kenyan courts have taken.

In terms of policies, Kenya has had various sessional housing papers with the aim of instilling change and form a remedy to curb homelessness. Moreover, the Ndung'u report and the Njonjo report sparked the need to tackle homelessness due to the mass land grabbing that was reported.²²⁰ Additionally, the coming into force of the 2010 constitution addresses the right to adequate housing under article 43(1)(b) where it states that 'every person has the right to accessible and adequate housing, and to reasonable standards of sanitation'.²²¹ Contrastingly, in South Africa, the right to housing is specified in their constitution under article 26.²²²

²¹⁶ Moeti K, South Africa's Deadly Housing Crisis, Project Syndicate, 2023 - <https://www.project-syndicate.org/commentary/johannesburg-tragic-fire-underscores-housing-crisis-by-koketso-moeti-2023-10>

²¹⁷ Centre of Affordable Housing Finance in Africa, Housing Finance in South Africa, 2023 - <https://housingfinanceafrica.org/countries/south-africa/>

²¹⁸ Moeti K, South Africa's Deadly Housing Crisis, Project Syndicate, 2023 - <https://www.project-syndicate.org/commentary/johannesburg-tragic-fire-underscores-housing-crisis-by-koketso-moeti-2023-10>

²¹⁹ Chenwi L, A Road to Home: The Right to Housing in Canada and Around the World, 71 – 78.

²²⁰ Klopp J, Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya, 7–26.

²²¹ Article 43(1)(b), Constitution of Kenya, 2010.

²²² Article 26, Constitution on South Africa, 1996.

Moreover, they have various acts relating specifically to arbitrary evictions, catering to the homeless and persons living in informal settlements.²²³

Another comparison to note is the current approach that each state is taking. In Kenya, there was the approach of the Housing levy which was to be a funding mechanism for the Boma yangu project.²²⁴ This is a project whose main aim is to build and provide housing for low-income earners. However, this was stopped by the courts. The reasoning that the Court of Appeal and the High court held was that the collections were discriminatory against persons with formal employment as compared to person in informal settlements. While in South Africa, current approach taken is of the Department of Human Settlements, whose objectives are to developing integrated human settlements, upgrading informal settlements, facilitating affordable housing and delivery of title deeds to the housing beneficiaries. These objectives were set in 2023 and to be effective within the financial year 2023/24.²²⁵

When looking at the approach that the courts have taken, it is important to note that the constitutions of both countries are similar hence there are few distinguishable features. In Kenya, the courts focus more on the property right that the owner of the land has and fails to consider alternative relocation of the squatters and slum dwellers. The courts fail to recognise their socio-economic right to housing and further fails to recognise the arbitrary nature of the evictions. This was established in the cases of *Gidion Mbuvi Kioko v Attorney General*,²²⁶ as well as *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others*.²²⁷ In contrast, in South Africa, the courts have taken a different approach in addressing the housing crisis in terms of addressing the issue on evictions and alternative housing available to low-income earners. This was highlighted in the Grootboom case, Olivia Road case and the Joe Slovo case.²²⁸

²²³ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998; Extension of Security of Tenure Act 62 of 1997.

²²⁴ Marindany J and Seur A, All You Need to Know About the Housing Levy, LexgroupAfrica, 2023 - <https://lexgroupafrica.com/index.php/notices-publications/59-all-you-need-to-know-about-the-housing-levy>

²²⁵ Department of Human Settlements, , Republic of South Africa, South African Government, Human Settlements - <https://www.gov.za/about-sa/humansettlements>

²²⁶ *Gidion Mbuvi Kioko v Attorney General & another* [2017] eKLR.

²²⁷ *Gidion Mbuvi Kioko v Attorney General & another* [2017] eKLR, *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others* [2013] eKLR (unreported).

²²⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* (2000); *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* (2008); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (2009).

4.5 - CONCLUSION

To conclude, housing is an integral part of a country's economy. As seen from the examples of South Africa, the provision of social and public housing is very possible, and Kenya can achieve this. The approaches taken by South Africa should not be applied directly but depending on the status of our country. Given the similarity of the legal system between Kenya and South Africa, the application of some of the policies would not be a hindrance. The next chapter will be the final chapter. It will give the recommendations in which the government could adopt and the approaches that could be taken.



CHAPTER 5

RECOMMENDATIONS ON A BETTER APPROACH TO THE HOUSING CRISIS

This is the final chapter of this dissertation. It will give the recommendations needed to adequately address the housing needs of the low-income earners. It goes without saying that the housing crisis is an issue that many Kenyans face in terms of lack of affordable housing and lack of secure tenure. This dissertation proposes four recommendation that would enable individuals from accessing secure tenure as well as ensuring that they are living in an environmentally friendly area.

5.1 - A System That Allows The Manifestation Of The Housing Policies.

A system should be put in place that ensures that the measures that have been set by the government should be adhered to and should be a reference point. This system should have the specific function of serving the low-income earners and the homeless. It is important to understand that with a system in place, issues of corruption and land grabbing are further apprehended since the system should ensure that there is adequate registration of land, issuing of titles and registration of persons in the waiting list for persons to be included in the slum upgrading projects as well as the Boma Yangu Project. This will ensure that there is an accurate allocation of housing to those in need instead of those capable of buying the houses.

This system would also monitor the amount of rent coming in so as to cater for the cost of maintenance and avoiding the issue of slum billionaires. Monitoring the slums payment can be instrumental since this has been an industry created by slum dwellers who act as landlords to receive rental income. With this system in place, it would enable these payments to be made in a more secure way and there would be sufficient ground to make a claim to a court of law since there would be sufficient evidence within the system. Therefore, to curb this issue, the system would ensure that the rental incomes payment methods are within the system.

5.2 - Subsidies, Lower Rent Rates And Improving Credit.

The people living in the slum areas mostly either have poor access to credit or are not credit worthy. Therefore, to improve this, it should be essential to expand the existing credit facilities to low-income earners, so as to be able to gain credit to access mortgage, for example. Additionally, there should be credit facilities that allow their businesses to grow so as to be able to cater for their needs.

Nevertheless, given the rise of the living standards, improving credit cannot be a standalone approach but could be supplemented with other approaches such as putting a subsidy on the materials used for construction and/or on the rental rates. Having a subsidy in place would be an added cost to the government however the return on investment would be greater. This is because, there would be more resources for the construction of these houses. Also, a lot more land would be freed from the allocation of housing therefore accelerating the land clearance activity.

Additionally, having lower rent rates, this would mean that the rent rates are below the market price, to enable the low-income earners to access housing. This, however, would need the collaboration of other sectors such as labour relations so as to provide and connect to the homeless and low-income earners with employment opportunities so as to be able to cater for rent. Also, the financial sector would have a part to play in creating an enabling environment for low-income earners to access credit and gain social security.

5.3 - The Use Of Policies To Prevent Slums From Erupting.

Even though efforts made to improve slum settlement through the slum upgrading in creating water taps and better drainage, slum are still erupting. In order to curb this, there should be policies and law made to ensure that slums do not erupt but rather they should be able to seek assistance from government or from the entities working with the government to ensure that there are available units.

Policies to prevent slum eruption should encompass the prevention of building of iron corrugated houses in areas that are government land, public land and private land. This is to ensure that the required standard for the housing units is met, in the sense that the person or people living in those areas are living in a healthy and sustainable environment. Moreover, having such a policy would ensure that low income earners are living in areas that are specifically allocated to them instead of land that is occupied, within another person's property rights or areas that are not suitable for living.

Moreover, there should be policies that regulate the migration of persons from rural areas to urban areas. This should be a mechanism that ensures that the urban slum population does not swell and hinders unemployed persons from resorting to live in deplorable conditions due to the high cost of living in the urban areas. Most importantly, the regulation of persons should be done on the basis of employment, so as to encourage and open opportunities for the unemployed. This policy should not be seen as a hindrance to person from the rural areas but

rather it is a mechanism to reduce the urban poor population. In addition, there should be employment opportunities created in the rural areas so as to encourage development and hinder the relocation to urban areas.

An additional policy would be registration of housing units. This includes housing units that are within the bracket of social housing and affordable housing where the slum dwellers are allocated to. This ensures that each person who is in most need of housing is allocated to a unit and catered for. Also, it ensures that a person allocated to a registered house does not rent it out so as to gain an income, while they live in the slum settlements (this is covered under Chapter 2, 2.3). It avoids the instance of slum millionaires and ensures that slum settlements are slowly eradicated and better housing units are provided.

5.4 - Conclusion

In conclusion, the housing crisis is one that has grappled the whole world, but specifically looking at Kenya, Kenya has struggled significantly. Due to this, a large part of the Kenyan population live in the slum settlements and rely heavily on the government's provisions rather than their own. It should therefore be stated that housing is an important aspect of the economy and would only serve the whole country at large.

Additionally, by having the ability to access housing it would ensure that there is an improvement in security since there would be watchmen and personnel employed to safeguard these estates. Moreover, the social and affordable housing should be environmentally friendly, meaning that there should be access to water, electricity, and efficient drainage. There should also be access to roads and sanitation for the women and young girls.

Housing is a building block for a country's economy. It is a make-or-break point since standard and sufficient housing improves the lives of the low-income earners, and resultantly of the middle class and upper class. Kenya has the potential to break its cycle of unreliable actions on the policies and make a difference.

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